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The Cuban quarantine and the law of self-defense

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AN ABSTRACT

of

THE CUBAN QUARANTINE AND THE LAW OF SELF-DEFENSE

by

James D. Taylor, Jr.

Submitted to the
Faculty of the School of International Service
of The American University
in Partial Fulfillment of
the Requirements for the Degree
of
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The Moral Obligation and the Art of Self-Defense

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ABSTRACT

This paper analyzes the Naval Quarantine of Cuba undertaken by the United States Government in the "missile crisis" of October-November, 1962, in order to determine the legality of the quarantine and to draw conclusions as to the permissibility, under international law, of the use or threat of force in self-defense.

The official case made by the Government in support of the legality of the quarantine is found to be insufficient legally to justify the quarantine. However, analysis of traditional international law concerning the right of self-defense is found to justify it, and the law of the UN Charter is found not inconsistent with this right.

It is concluded that the traditional right of self-defense must remain unimpaired as long as it is possible for a nation to be confronted with a situation in which the resort to, or threat of, force is the only course offering a reasonable prospect of that nation's continued security.

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CHAPTER I

INTRODUCTION

On the evening of October 22, 1962, President John F. Kennedy told an expectant American television and radio audience of the development in Cuba by the Soviet Union of strategic bases for modern nuclear weapons systems.[1] Sites were under construction for medium-range ballistic missiles, some of which were already on the island; construction had been started on facilities for installation of intermediate-range ballistic missiles; jet air bases were under construction; and bombers with the capability for carrying nuclear weapons were already stationed on the island.[2] Describing the purpose of these bases as "none other than to provide a nuclear strike capability against the Western Hemisphere,"[3] the President announced that the United States Government was taking a number of initial steps to meet the challenge to the hemispheric security, including that of the institution of a "strict quarantine on all offensive military equipment under shipment to Cuba."[4] In the same address,

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[1] Text of the President's address, White House press release, Department of State Bulletin, XLVII (November 12, 1962), 715.

[2] Ibid.

[3] Ibid.

[4] Ibid., pp. 716-717.

CHAPTER I

INTRODUCTION

the President announced that he was calling for an immediate meeting of the Organ of Consultation of the Organization of American States and for an emergency meeting of the United Nations Security Council to consider the situation created by the sudden build-up of offensive military weapons in Cuba by the Soviet Union.[5]

On the following day, October 23, the Council of the Organization of American States met in Washington as the Provisional Organ of Consultation, found the Cuban Government to have endangered the peace of the Americas, called for the withdrawal of offensive weapons from Cuba, and recommended that O.A.S. members take measures, including use of armed force, to prevent introduction of additional weapons and to prevent those weapons already in Cuba from becoming operational.[6] Shortly after passage of the O.A.S. resolution, and formally on the basis of it, President Kennedy signed an executive proclamation[7] placing the quarantine into effect as of 2:00 p.m., Greenwich time, on October 24.

The United States Ambassador to the United Nations,

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[5] Ibid., p. 718.

[6] Ibid., p. 722; see also Appendix B, infra, p. 114.

[7] "Interdiction of the Delivery of Offensive Weapons to Cuba," Proclamation No. 3504, Federal Register, 27:10401; reprinted in Department of State Bulletin, op. cit., p. 717; and The American Journal of International Law, LVII (1963), p. 512. See also Appendix A, infra, p. 110.

on October 22, 1962, delivered to the President of the Security Council a letter requesting an urgent meeting to deal with the Cuban situation.[8] Mr. Stevenson presented the United States position to the Security Council on the evening of October 23 and, during the course of his presentation, read the operative paragraphs of the OAS resolution.[9] The United States had submitted a draft resolution[10] for Security Council consideration along with the request for the Council meeting, but neither it nor a Soviet draft resolution was pressed to a vote.[11] The role of the United Nations in helping resolve the crisis was limited to that of the mediation efforts of the Secretary-General and of facilitating the public exposition of the views of the parties directly concerned and of other states.[12] The quarantine was ended on November 20, 1962,[13] as the result primarily of

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[8]State Department Press Release 636, Department of State Bulletin, op. cit., p. 724.

[9]Department of State Bulletin, op. cit., p. 723.

[10]Text in ibid., p. 724.

[11]United Nations, Yearbook of the United Nations, 1962 (New York: Columbia University Press, 1964), pp. 104-111.

[12]For general discussions of U.N. activities during the crisis, see UN Review, 9 (November, 1962), 6-17, 77-84; UN Review, 9 (December, 1962), 1; and United Nations, op. cit., pp. 104-111.

[13]Announced at Presidential News Conference on November 20. Department of State Bulletin, XLVII (December

agreement between the governments of the United States and the Soviet Union providing for the withdrawal of offensive weapons from Cuba and the halt in further introduction of such weapons into Cuba.[14]

As might have been expected, the reaction of Communist bloc countries to the American defensive quarantine was outspoken. Cuba's request for an urgent Security Council meeting proposed that the Council consider "the act of war unilaterally committed by the Government of the United States in ordering the naval blockade of Cuba"[15] and the Soviet Union termed the quarantine a "violation of the Charter of the United Nations and a threat to the peace on the part of the United States of America"[16] as well as "an unprecedented violation of international law."[17] The Romanian delegate to the Security Council declared that

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10, 1962), 874; proclaimed in Presidential Proclamation No. 3507 (November 21, 1962). Federal Register, 27:11525, reprinted in Department of State Bulletin, XLVII (December 17, 1962), 918.

[14]Terms of agreement in exchange of messages between Chairman Khrushchev and President Kennedy, October 27-28, 1962, Department of State Bulletin, XLVII (November 12, 1962), 741.

[15]"Critical Situation in Caribbean Urgently Considered by Security Council," UN Review, 9 (November, 1962), 6.

[16]Ibid.

[17]Ibid., p. 7.

United States actions constituted not only a violation of the rights of peoples to peace, freedom, and national independence, but also a provocation that could push the world toward a nuclear war.[18]

Criticism of the conduct of the United States was not limited to that which emanated from Communist sources. The delegate from the United Arab Republic stated that American action was contrary to international law and the accepted norms of freedom of the seas[19] and the delegate from Ghana questioned whether Cuba's receiving weapons from the Soviet Union justified "naval blockade."[20]

Although the action undertaken by the United States was generally supported by governments of the Western democracies,[21] there was no lack of criticism from non-governmental sources on the ground that the quarantine was illegal under international law. A noted French writer, for example, concluded that President Kennedy had placed security above the law.[22] And a prominent American specialist in

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[18]"Grave Concern with Situation Reflected in Council Debate," UN Review, 9 (November, 1962), 16.

[19]Ibid., p. 17. [20]Ibid., p. 78.

[21]Discussion of official Western reaction in Carl Q. Christol and Charles R. Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiél to Cuba, 1962," The American Journal of International Law, 57 (1963), 525 and 528.

[22]Raymond Aron, "International Law--Reality and Fiction," New Republic, 147 (December 1, 1962), 13 and 14.

international law, while conceding that the United States acted with skill in obtaining removal of the weapons from Cuba without hostilities or U.N. criticism, nevertheless concluded that the quarantine was illegal and that the episode had not "improved the reputation of the United States as a champion of international law and [that] it may prove an unfortunate precedent. . . ."[23]

From a perspective wholly different from that of those who criticized American conduct and those who defended it as legal and proper in the circumstances, a former American Secretary of State expressed the view that the "propriety of the Cuban quarantine is not a legal issue."[24] He added:

> The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power—power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. . . . No law can destroy the state creating the law. The survival of states is not a matter of law.[25]

The remarks of the former Secretary of State are, doubtless, a bit extreme and this probably is due to the

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[23]Quincy Wright, "The Cuban Quarantine," The American Journal of International Law, 57 (1963), 546 and 563.

[24]Opinion expressed by Dean Acheson at the 57th annual meeting of the American Society of International Law, Washington, D. C., April 25, 1963, "Law and Conflict: Changing Patterns and Contemporary Challenges," Proceedings of the American Society of International Law, 57 (1963), 1 and 15.

[25]Ibid.

belief that criticism of the legal basis for the quarantine rested on a proposition that international law requires a nation to refrain from the use of force in international relations to the point where its destruction, in certain circumstances, would be certain. Indeed, this would be the case, as will be shown, if a restrictive interpretation of the right of a state to use force in self-defense were held valid in contemporary law.

In any case, it seems obvious that the propriety of a nation's conduct with respect to other states is clearly subject to scrutiny and evaluation in terms of the laws which regulate the conduct of states. This is all the more obvious in a situation, such as the Cuban crisis, which involves the threat to use military force to cause a modification in the policies being pursued by other states. Situations of this nature are the things which have given international law its greatest impetus, especially during the Twentieth Century. The prevention and control of international conflict are the subject matter of the highest political and legal priority in this era. Therefore, the whole of the political and military measures taken during the missile crisis was subject to the totality of international law.

What then is the international law which it has been alleged that the United States was guilty of having violated?

What principle of law requires men to make a choice between security and legality? What law leads men to applaud the skill and effectiveness of a course of action taken by their government--while entertaining reservations as to its legality? Certainly most objective opinion would regard the international conduct of the United States in recent years to have been generally non-aggressive. It would, therefore, be ironic if it should be found through dogmatic conclusions that our government was an aggressor, an international offender, against a nation which, by any reasonable standard, has been consistently aggressive and was in its Cuban enterprise patently so. Such a finding would be extremely unwise, unless there is a clear, compelling case for it.

The primary reason for disagreement as to the answer to the question of the legality of the Cuban quarantine is the differing concepts of the right of a state to take forcible measures against another state. More specifically, it is a question of the right of a state to use or threaten force in its self-defense in situations not involving actual armed attack by an adversary. The Cuban quarantine provided a good illustration of the uncertainty as to precisely what international law is on this subject. Furthermore, it clearly demonstrated the necessity for recognition of a realistic doctrine of self-defense which is compatible both with the legitimate interest of states in their own defense

and with the uncompleted task of the institutionalized regulation of force within the international system. Finally, the Cuban crisis provided a useful illustration of the role which regional organizations can play in collective self-defense.

CHAPTER II

THE UNITED STATES GOVERNMENT'S CASE FOR THE QUARANTINE

The official attitude of the United States Government toward the question of the legality of the Cuban quarantine admitted that the situation created by the Soviet introduction of offensive weapons into Cuba was unprecedented and that there was no clearly prescribed and carefully delineated set of procedures available for dealing with this novel situation.[1] This uncertainty was attributed by the Deputy Legal Advisor of the State Department to changing concepts of international law which he described as the product of "new circumstances and the response to new conditions in the international environment."[2] In spite of the novelty and difficulty of the situation, the Government's intention was that the actions taken rest on the "soundest foundations in law and . . . appear in that light to all the world. . . ."[3] While it was later admitted that progress in alleviating the situation could not, on the whole, have been attributed to

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[1] Leonard C. Meeker, "Defensive Quarantine and the Law," The American Journal of International Law, 57 (1963), 515.

[2] Ibid.

[3] Ibid.

the legal position of the United States,[4] the question of legality of actions taken and contemplated was apparently kept in the forefront of State Department thinking.

While the Government might have rested its case for the quarantine on a number of approaches, that chosen was the right of maintaining international peace and security through regional organizations, in accordance with Article 52(1) of the United Nations Charter.[5] Although it has not been the position of the United States that this is the only basis on which the legality of the quarantine could have been sustained, the Government has not formally employed other justifications.

Traditional International Law

The term "quarantine" was applied to the interdiction of offensive weapons and associated material bound for Cuba in an apparent attempt to avoid, insofar as possible, the implication that the United States was undertaking a belligerent measure. The similarity of the quarantine with many

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[4]Abram Chayes, Legal Advisor, Department of State, "The Legal Case for U. S. Action on Cuba," address before the Tenth Reunion of the Harvard Law School Class of 1952 in Boston, Massachusetts, November 3, 1962, in Department of State Bulletin, XLVII (November 19, 1962), 763.

[5]The American Journal of International Law Supplement, 39 (1945), 190.

the legal validity of the Indian Treaties.[3] The question of legality of actions taken was considered one dependently open to but interest of state jurisdiction.

While the Constitution clearly does restrict the power the jurisdiction of a number of purposes, that empower the right of maintenance [illegible] peace and security between employed by[illegible], it [illegible] it has not [illegible] of the United States Courts,[4] although it has not been the position of the Supreme Court that this is not many to which the legality of the [illegible] could have been [illegible] the Government can put [illegible] other [illegible].

[illegible] [illegible]

The term "[illegible]" was [illegible] to the [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] it be [illegible] [illegible] [illegible] [illegible], the [illegible] [illegible] [illegible] [illegible] [illegible]

aspects of a blockade was admitted,[6] but the Government was careful to avoid use of the term "blockade" and consistently referred to the interdiction as a "defensive quarantine." In international law, a traditional blockade requires a state of war;[7] the U. S. Government made every effort to show that what it was carrying out was not an act of war. The President in his radio and television speech on October 22, 1962,[8] first publicly characterized the action as a "strict quarantine."[9] "There was no assertion of a state of war or belligerency."[10]

There is also the device of so-called "pacific blockade" which, although used on numerous occasions since the beginning of the Nineteenth Century by large states against small, has had at best an uncertain status in international law and has frequently been challenged as illegal by some states--notably the United States.[11] The United States has denied that such a blockade can be applied

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[6]Abram Chayes, "Law and the Quarantine of Cuba," Foreign Affairs, 41 (April, 1963), 550 and 551.

[7]Herbert W. Briggs (ed.), The Law of Nations (second edition; New York: Appleton-Century-Crofts, Inc., 1952), p. 991.

[8]Text in Department of State Bulletin, XLVII (November 12, 1962), 715.

[9]Ibid., p. 716. [10]Meeker, loc. cit.

[11]Briggs, op. cit., p. 959.

[illegible]

against a third state. As the quarantine was a selected interdiction[12] directed against a third, it would have been, at the very least, an inconsistency had it been justified by the United States as a pacific blockade. The United States did not rest its case on such grounds[13] and avoided use of the term in official statements on the subject of the quarantine.

Although public pronouncements concerning the Cuban situation were studded with clear implications that the United States response was motivated by considerations of national and regional self-defense, the Government did not make a claim that it was reacting in necessary self-defense under the traditional rules of international law. For instance, President Kennedy, in his address of October 22, characterized the steps to be taken as "in the defense of our own security and of the entire western hemisphere."[14] However, the Legal Advisor to the State Department later pointed out that "neither the President in his speech nor

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[12]Text of the President's proclamation entitled, "Interdiction of the Delivery of Offensive Weapons to Cuba," Proclamation No. 3504, Federal Register, 27:10401. Reprinted in Department of State Bulletin, XLVII (November 12, 1962), 717, and The American Journal of International Law, 57 (1963), 512. See also Appendix A, infra, p. 110.

[13]Meeker, loc. cit.

[14]Department of State Bulletin, XLVII (November 12, 1962), 716.

the O.A.S. in its resolution invoked article 51 [of the U.N. Charter]."[15] A discussion of the motivative force of considerations of self-defense[16] and an analysis of the quarantine in terms of the law relating to self-defense[17] are presented at a later point in this paper.

The Organization of American States

In his radio and television speech of October 22, President Kennedy announced that the United States was calling for an immediate meeting of the Organ of Consultation of the Organization of American States to consider the situation created by the Soviet weapons build-up in Cuba. On the following day, the Council of the OAS met in Washington and constituted itself as the Provisional Organ of Consultation in accordance with the procedures prescribed in the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).[18] It considered the evidence of the Soviet build-up of offensive weapons in Cuba and determined that

> Incontrovertible evidence has appeared that the Government of Cuba, despite repeated warnings, has

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[15]Chayes, "Law and the Quarantine of Cuba," op. cit., p. 554.

[16]Infra, pp. 29-32. [17]Infra, Chapter IV.

[18]United Nations, Treaty Series, Vol. XXI (New York: United Nations, 1948), pp. 93-115. Article 12 provides that the Governing Body (Ambassadors to the OAS) "may act provisionally as an organ of consultation until the meeting of the Organ of Consultation . . . takes place."

> secretly endangered the peace of the Continent by permitting the Sino-Soviet powers to have intermediate and middle-range missiles on its territory capable of carrying nuclear warheads.[19]

The Organ then resolved to call for the "immediate dismantling and withdrawal" of the offensive weapons from Cuba and

> 2. To recommend that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed forces, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.[20]

It was on this OAS resolution and the Rio Treaty that the United States Government based its official case for the legality of the Cuban quarantine. "It was the conclusion of the United States Government that this treaty and the resolution of October 23, 1962, clearly authorized the defensive quarantine of Cuba."[21] It was also observed, with respect to the validity of the action as against Cuba, that the Rio Treaty binds all the American Republics, including Cuba, and that thus there was a consensual basis in treaty between the

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[19]Text of OAS resolution adopted October 23, 1962. Department of State Bulletin, XLVII (November 12, 1962), 722 and 723. See also Appendix B, infra, p. 114.

[20]Ibid.

[21]Meeker, "Defensive Quarantine and the Law," op. cit., p. 517.

> dangerously endangered the peace of the Continent by permitting the Sino-Soviet powers to have intercontinental and middle-range missiles on its territory capable of carrying nuclear warheads.[19]

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[19] Text of OAS resolution adopted October 23, 1962, Department of State Bulletin, XLVII (November 12, 1962), 722 and 723. See also Appendix C, infra, p. 215.

[20] Ibid.

[21] Meeker, "Defensive Quarantine and the Law," op. cit., p. 517.

United States and Cuba for the quarantine.[22] It is obviously quite a different matter to defend the legal validity of the quarantine with respect to its application against the Soviet Union. The State Department's position was that since the Rio Treaty established a regional organization for maintaining peace and security, the purposes and activities of which are in conformity with the U. N. Charter, other countries, such as the Soviet Union, were in no position to attack the organization's activities within the region.[23] It has elsewhere been claimed that the application of the quarantine against the Soviet Union can be justified on the basis that the U.S.S.R. shared in Cuba's offense against the inter-American community as an accomplice.[24] Interesting as these proferred justifications are, it is difficult to accept the proposition that the quarantine could legally have been made applicable against the Soviet Union, or any other third state, purely on the basis of a decision made by a regional organization, of which they were not members, unless other grounds existed which justified application of coercion against them. It is a principle "sustained by

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[22] Ibid.

[23] Ibid., p. 518.

[24] Charles G. Fenwick, "The Quarantine Against Cuba: Legal or Illegal?," The American Journal of International Law, 57 (1963), 588 and 591.

doctrine, jurisprudence, and the practice of States"[25] that a state is not legally bound by the provisions of a treaty which it has not accepted. Since the Soviet Union had not accepted the Rio Treaty, it was not binding on the U.S.S.R. Its application against activities of the U.S.S.R. would have to be justified on other legal grounds if the quarantine is to be defended as legitimate.

The Rio Treaty was concluded by the American Republics in order to

> assure peace, through adequate means, to provide for effective reciprocal assistance to meet armed attacks against any American State, and in order to deal with threats of aggression against any of them.[26]

Therefore, by its own provisions it is authorized to take action against "armed attack" and against "threats of aggression." Article 3 of the Treaty provides for response to armed attack "by any State against an American State," but the resolution of October 23 was not taken under this authority since only the most expansive interpretation of "armed attack" would have justified interpreting the Soviet military build-up in Cuba as a constructive armed attack.

The OAS resolution was warranted, from the standpoint of the Rio Treaty, by Article 6 which authorizes the taking of measures in assistance to a victim of aggression, and for

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[25] Briggs, op. cit., p. 870.

[26] Preamble.

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[27] Briggs, op. cit., p. [illegible].

[28] Preamble.

the common defense, or for the maintenance of continental peace and security in situations involving "an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America." The quarantine was a legitimate measure, insofar as the Rio Treaty is concerned, since the use of armed force is one measure authorized by Article 8 of the Treaty for application by the Organ of Consultation of the OAS. The passage of the October 23 resolution was legally undertaken by more than the required two-thirds vote of signatory states.[27]

It is interesting to review, at this point, the chronology of the events leading to the institution of the quarantine. The President of the United States announced in his speech on the evening of October 22 that a "strict quarantine" would be taken as an "initial step,"[28] to secure the removal of offensive weapons from Cuba. The resolution of the OAS was passed on the following day, and it subsequently became this resolution upon which the U. S. Government based

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[27]The vote in the Council was nineteen to nothing with one abstention. Uruguay's delegate abstained on October 23 because of not having received instructions from his government, but on October 24 cast an affirmative vote. Department of State Bulletin, XLVII (November 12, 1962), 716.

[28]Department of State Bulletin, XLVII (November 12, 1962), 716.

[illegible]

the legal defense of the quarantine. Therefore, although the Presidential Proclamation of the quarantine was formally issued after the OAS action and was scheduled to go into force at 2:00 p.m. (Greenwich time) on October 24,[29] the U. S. Government was clearly committed to a course of action which it would undoubtedly have pursued regardless of what action the OAS had taken. The Organ of Consultation of the OAS, therefore, really had only a choice of giving or withholding authorization of an action which would have been carried out in any event. This does not mean, however, that the OAS action was any the less reflective of the true feelings of the American governments. The Latin American republics have a long history of distrust for United States policy in the Americas and a strong reluctance to permit United States "intervention" in any other American state. It could hardly be supposed that they would have condoned unilateral United States intervention in Cuban affairs had they not sincerely felt it justified by circumstances and authorized under the Rio Treaty. It seems more likely that the OAS action came as a result of the realization of a serious threat to the hemisphere and of the strong, determined leadership of the United States. Regardless of whatever may have been the intention of the U. S. Government had

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[29]Appendix B, <u>infra</u>, p. 114.

the OAS not approved the course of action it did authorize, it must be admitted that United States action in implementing the quarantine was carried out formally in pursuance to the Consultative Organ's resolution of October 23.

Charter of the United Nations

The justification of the legality of the quarantine advanced by the United States Government, based as it is on the rights of the Organization of American States in maintaining international peace and security, must, of course, be subjected to analysis from the viewpoint of the law of the Charter of the United Nations.

Chapter VIII of the Charter specifically recognizes regional organizations as instrumentalities for dealing with regional subjects related to international peace and security provided that such organizations and their activities are consistent with U. N. purposes and principles.[30] The Charter goes so far as to encourage resort to such regional bodies prior to referral of local disputes to the Security Council[31] and to enjoin the Security Council to encourage the development of pacific settlement of local disputes through such instrumentalities either on application by states concerned or by reference from the Security

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[30]Article 52(1). [31]Article 52(2).

[illegible]

Council itself.[32] However, the Charter also prescribes important restrictions on the manner in which regional organizations may take enforcement action. The Security Council is encouraged to utilize regional arrangements for enforcement action, but, except for measures against the former World War II Axis Powers, regional organizations are prohibited from taking enforcement action without authorization of the Security Council.[33] In addition, action taken or contemplated by regional organizations for maintenance of international peace and security is required to be reported to the Security Council.[34]

With respect to the requirement for keeping the Security Council informed of action being undertaken, the Organization of American States acted properly by providing in its October 23 resolution for informing the Security Council of the action authorized.[35] Similarly, on the preceding day, the United States had called for an emergency meeting of the Security Council to consider the situation.[36]

United States Government spokesmen have broadly defended the legality of the quarantine under the law of the

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[32]Article 52(3). [33]Article 53(1). [34]Article 54.

[35]Appendix B, infra, p. 114.

[36]Department of State Bulletin, XLVII (November 12, 1962), 724.

Charter as an action taken by a regional arrangement which is consistent with the "Purposes and Principles of the United Nations."[37] Reference has been made to the influence of the Act of Chapultepec in the writing of those portions of the Charter dealing with regional organizations, the assertion that the Act was consistent with the Charter being written at San Francisco, and the fact that the exact language of the Act was incorporated into the Rio Treaty of 1947.[38] However, it is important to draw a clear distinction between an organization, in itself consistent with U. N. purposes and principles, and an action taken by that organization. The fact that the OAS is intrinsically consistent with U. N. purposes and principles does not guarantee that each of its acts is consistent with, and legal under, the law of the Charter.

The most serious shortcoming in the U. S. Government's case would seem to lie in the difficulty of squaring OAS action with Article 53(1) of the Charter. This article provides, in part, that "no enforcement action shall be taken under regional arrangements or by regional agencies

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[37]Article 52(1). For discussion of this broad aspect, see Chayes, "The Legal Case for U. S. Action on Cuba," op. cit., p. 764; Chayes, "Law and the Quarantine of Cuba," op. cit., p. 555; and Meeker, op. cit., pp. 518-519.

[38]Meeker, op. cit., pp. 518-519; and Chayes, "Law and the Quarantine of Cuba," op. cit., p. 554.

without the authorization of the Security Council . . . [except against former Axis Powers]." The Government's case has been based on an interpretation of the OAS action as not constituting "enforcement action" since it was not obligatory on all OAS members.[39] Apparently desiring to backstop this proposition, State Department officials have further claimed that Security Council authorization need not be prior authorization[40] or even express authorization.[41]

The interpretation of "enforcement action" as excluding recommendatory action not having the force of obligation on OAS members is taken by analogy from precedents established within the United Nations Organization. In the U. N. the distinction is made between Security Council measures which are obligatory on all members, taken on the one hand as properly constituting "enforcement action," and measures only recommended by either the Security Council or the General Assembly, on the other hand. The latter are not considered "enforcement" measures. This distinction has been upheld by the International Court of Justice in the

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[39]Meeker, op. cit., pp. 520-522; and Chayes, "Law and the Quarantine of Cuba," op. cit., p. 556.

[40]Meeker, op. cit., p. 520; and Chayes, "Law and the Quarantine of Cuba," op. cit., p. 556.

[41]Meeker, op. cit., p. 522; and Chayes, "Law and the Quarantine of Cuba," op. cit., p. 556.

case on Certain Expenses of the United Nations in which it was held that measures taken by the Assembly and the Security Council in the Suez and the Congo were not enforcement action" since they were only measures recommended to participating states.[42] The Court stated specifically that "'action' must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make. . . ."[43]

Thus, since "enforcement action" is considered in U. N. parlance as not including action taken by a U. N. body which is only recommendatory on members, the term "enforcement action" in Article 53(1) necessarily excludes action taken by regional organizations which is not obligatory on all members of those organizations. Therefore, the reasoning goes, recommendatory action by regional organizations does not fall within that category of action for which Security Council authorization is required. The resolution adopted on October 23, 1962, by the Consultative Organ of the OAS merely recommended that member states "take all measures, . . . including the use of armed force . . ." to stop the weapons build-up in Cuba. Therefore, it is

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[42] International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1962 (Leyden, Holland: International Court of Justice, 1962), pp. 151-181.

[43] Ibid., p. 165.

possible following this line of reasoning, to conclude that the resolution recommending quarantine "should not be held to constitute 'enforcement action' under Article 53(1) requiring Security Council authorization."[44]

But this reasoning is not entirely convincing. In the first place, it is less than certain that the International Court of Justice would have held that the same distinction made between "enforcement action" and recommended action taken at the behest of a U. N. organ must necessarily apply in the case of similar action by a regional organization. Furthermore, the question which the Court resolved was framed in the perspective of budgetary matters and only by uncertain inference is it analogous to questions of the legality of the use of force by a regional organization on a claim of maintaining peace and security. From the point of view of what must have been the intent of Article 53(1), it would seem to be of little relevance whether a regional action was obligatory on members or merely recommendatory. The clear intent of Article 53(1) was to subordinate the right of regional organizations to take forcible action to the primary authority of the Security Council in keeping the peace. The results would most likely be the same whether a regional organization made its action obligatory on members

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[44]Meeker, op. cit., p. 522.

[illegible]

or only voluntary; if it had the votes to make action obligatory, it would certainly have the votes to recommend it. Why should a regional organization be allowed an escape from Charter requirements merely by using the word "recommends"? There is certainly little prospect that recommended action would necessarily be more nearly consistent with U. N. purposes and principles than would obligatory action. Either would be equally open to abuse. It thus appears that the OAS action in authorizing the Cuban quarantine was not valid legally as an action upholding international peace and security by reason of the lack of Security Council authorization. Its validity must be supported on some other grounds.

Nor are the precedents advanced supporting the contentions that Security Council authorization need not be either prior or express any more convincing. These contentions have been advanced apparently to serve as a back-up to the previously discussed argument that Security Council authorization was not required in the first place. It must be observed, however, that the U. S. Government's case did not depend on these precedents[45] since its claim that Security Council approval was unnecessary would have made them irrelevant. To support the suggestion that authorization can be given after the fact, reference has been made to a

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[45] Ibid.

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[12] Ibid.

1960 precedent. In that situation, the Soviet Union asked the Security Council to give retroactive approval to diplomatic and economic sanctions voted by the American Foreign Ministers against the Dominican Republic.[46] It is interesting to note, however, that the Security Council did not take formal action to that effect but only took note of the OAS action.[47] Reference has been made to the precedent set within the Security Council of not considering abstentions and absences from Council voting as depriving the Council of "the concurring votes of the permanent members" in the adoption of resolutions.[48] This precedent has been said to constitute the basis for assuming that Security Council authorization can be implied. The Council's failure to act on a Soviet resolution condemning the quarantine has thus been interpreted in this way.[49] It is important to distinguish these precedents as being political actions and as not of juridical character. The Security Council is primarily a political organ, and its precedents cannot be taken as necessarily establishing rules having legal validity. To infer tacit and retroactive Security Council approval from its

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[46]Cited in ibid., p. 520.

[47]"Security Council Takes Note of Decision of Organization of American States," UN Review, 7 (November, 1960), 68 and 88.

[48]Meeker, op. cit., 522.

[49]Ibid.

disinclination or inability to reach any decision on a question of action taken by a regional organization would be very nearly to deprive Article 53(1) of any practical effect. Carried to its ultimate extreme, such an interpretation of Security Council approval would support the contention that in a situation where one permanent member "vetoed" a Security Council resolution condemning regional action, the situation would constitute tacit, retroactive approval of that regional action undertaken, even if ten Security Council members had joined in voting for the condemning resolution. The "plain and natural meaning" of the words of Article 53(1) do not permit such an interpretation. Rather, they clearly imply that in order for a regional organization to take forcible measures to maintain international peace and security, it must be first authorized to do so by the Security Council.

Therefore, the net effect of the Government's case, based on a claim that the OAS action did not constitute "enforcement action" and that, even if it did, Security Council approval of such action need not have been explicit or prior, is less than satisfactory. The applicable Charter provisions seem too clearly to dictate the opposite conclusions--that action of the type undertaken by the OAS does amount to the same thing as enforcement action and that prior approval for such actions must be given by the

Security Council. If the quarantine is to be upheld as valid under international law, it must be supported on grounds other than those contained in Chapter VIII of the U. N. Charter.

Self-Defense

While the United States Government has not defended the legal validity of the quarantine on a claim of necessary self-defense, it was obviously motivated in reacting to the Cuban situation by concern that the peace and security of the United States, as well as of the rest of the hemisphere, were endangered by the introduction of offensive weapons into Cuba. In his radio and television speech of October 22, President Kennedy referred to the transformation of Cuba into a strategic base as "an explicit threat to the peace and security of all the Americas"[50] and as adding to "an already clear and present danger."[51] The urgency of the threat was illustrated by his statement that modern weapons

> are so destructive and ballistic missiles are so swift that any substantially increased possibility of their use or any sudden change in their deployment may well be regarded as a definite threat to peace.[52]

He concluded that the "greatest danger of all would be to do

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[50] Department of State Bulletin, XLVII (November 12, 1962), 715.

[51] Ibid., p. 716. [52] Ibid.

nothing."[53] Regardless of what was subsequently to become the Government's legal justification for the quarantine, the President was obviously speaking in reaction to what he must have considered as a danger urgent enough to require response which could only be in the nature of anticipatory self-defense.

The United States request for an emergency meeting of the Security Council referred to the "determination of the countries of the Western hemisphere. . . to safeguard and defend the peace and security of the region against external interference and aggression. . . ."[54] Before the Council of the Organization of American States on October 23, Secretary of State Dean Rusk expressed the belief that "no nation of this hemisphere can feel secure from direct attack or from persistent blackmail,"[55] urged the Council that it must "act in defense of our national independence and democratic heritage,"[56] and asserted that the American republics had "the primary responsibility and duty to act as we are now doing as a hemisphere."[57]

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[53] Ibid., p. 719.

[54] Press Release 636, Department of State Bulletin, XLVII (November 12, 1962), 724.

[55] Press Release 640, Department of State Bulletin, XLVII (November 12, 1962), 720 and 721.

[56] Ibid.

[57] Ibid., p. 722.

The OAS resolution adopted on October 23 quoted the resolution adopted by the hemispheric foreign ministers at Punta del Este in January, 1962, in which it was urged that member states "take those steps that they may consider appropriate and for their individual and collective self-defense . . . " and "cooperate . . . to strengthen their capacity to counteract threats or acts of aggression, subversion, or other dangers to peace and security. . . ."[58] The Presidential Proclamation which was based on the OAS resolution and which ordered the quarantine into effect did so in order "to defend the security of the United States."[59]

The Legal Advisor to the Department of State subsequently wrote that the "United States saw its security threatened . . .,"[60] but also pointed out that "the President in his speech did not invoke article 51 or the right of self-defense," and that the OAS acted under Article 6, not Article 3 (self-defense in case of armed attack) of the Rio Treaty.[61]

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[58] Department of State Bulletin, XLVII (November 12, 1962), 722. See also Appendix B, infra, p. 114.

[59] Department of State Bulletin, XLVII (November 12, 1962), 717. See also Appendix A, infra, p. 110.

[60] Chayes, "The Legal Case for U. S. Action on Cuba," op. cit., p. 764.

[61] Ibid.

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[58] Department of State Bulletin, XLVI (March 12, 1962), 423. See also Appendix A, infra, p. 164.

[59] Department of State Bulletin, XLVII (November 12, 1962), 717. See also Appendix A, infra, p. 167.

[60] Chayes, "The Legal Case for U. S. Action on Cuba," loc. cit., p. 764.

[61] Ibid.

Therefore, the United States Government and, as well, the Organization of American States, by their actions and words appear clearly to have been reacting to the threat in the manner of self-defense and with all but the formally invoked claim of necessary self-defense. Since the validity of the case made by the U. S. Government in support of the legality of the quarantine has not been accepted as valid, it will be necessary to analyze it in the context of the international law of self-defense.

CHAPTER III

ALTERNATIVES FOR PEACEFUL SETTLEMENT

There are in international law and in the practice of states several methods for adjustment of international disputes through peaceful means. Indeed, the United Nations Charter obligates members who are parties to a dispute, "the continuance of which is likely to endanger the maintenance of international peace and security," to seek first a solution by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."[1] Furthermore, members are authorized to bring disputes, or situations which might lead to international friction or give rise to a dispute, to the U. N. Security Council or the General Assembly[2] and are obligated to bring to the attention of the Security Council disputes which have failed of settlement through peaceful means.[3] It might, therefore, be assumed that the United States Government could have, or should have, attempted to seek settlement of the Cuban crisis through one or more of these procedures before resorting to the measures of a naval quarantine.

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[1]Article 33(1). [2]Article 35(1).

[3]Article 37(1).

It should be observed initially, however, that the situation in Cuba in October, 1962, hardly constituted a "dispute" or a "situation which might lead to international friction or give rise to a dispute." To characterize it simply as such would be a gross oversimplification. A dispute most assuredly did exist--and had existed between the United States and Cuba, in one form or another, for many months--but it was not merely a matter of one which was "likely to endanger the maintenance of international peace and security." International peace and security, especially that of the United States and the other American republics, had already been endangered through the conduct of Cuba and the Soviet Union. Nevertheless, the clear overall intent of the U. N. Charter is to limit unilateral resort to force as a means of settling international differences, and the Charter contains elsewhere a specific blanket obligation on members to settle international disputes by peaceful means.[4] Therefore, it is necessary to assess the propriety of the imposition of a naval quarantine in the context of this obligation for the use of peaceful means of settlement.

An essential element in the consideration of peaceful alternatives available for the possible settlement of the Cuban situation is the degree of urgency present in that

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[4]Article 2(3).

[illegible]

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[illegible]

situation, for the urgency involved was a critical factor in the feasibility of peaceful alternatives and in the necessity for forcible measures of self-defense. Indeed, a sufficiently high degree of urgency, in any given situation of the nature of the missile crisis, could preclude the resort to peaceful alternatives and dictate a decision to resort to force in necessary self-defense. Any degree of urgency less than virtually the absolute would require weighing it against the prospects for just settlement without further compromising the security of the threatened state.

The Urgency of the Threat

The world may never know precisely the degree of urgency involved in the Cuban weapons build-up, or even the U. S. Government's assessment of that urgency, but it is possible to draw some important inferences which help clarify the situation, especially in relation to its impact on American thinking.

Public statements made by U. S. public officials offer one important source of information as to the urgency with which the situation was viewed by the Government. While it is admitted that such statements give only one side of the picture and are obviously subject to inaccuracies and exaggeration, they are, nonetheless, important as indicators of the Government's assessment of the nature of the threat to the country. This is important in its own right--

independent of an objective determination of the precise degree of urgency, if such were possible--for the reason that the reaction of the United States could only have been based on it. Moreover, it is significant that the Soviet Union never disputed the U. S. Government's claims of urgency insofar as they stated the nature of the weapons in the build-up and the progress being made in completing their installation. Soviet denials were, of course, made as to the offensive nature of the weapons involved.

President Kennedy spoke of the "urgent transformation of Cuba into an important strategic base,"[5] characterized the missiles in Cuba as adding to "an already clear and present danger,"[6] and described the "secret, swift, and extraordinary buildup of Communist missiles--in an area well known to have a special and historical relationship to the United States and the nations of the Western Hemisphere" as unacceptable to the United States.[7] Secretary of State Dean Rusk declared that the "immediate character of the nuclear military threat" was such that the American republics could not "tolerate any further opportunity to add to their [the

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[5]Television and radio address of October 22, 1962, Department of State Bulletin, XLVII (November 12, 1962), 715.

[6]Ibid., p. 716.

[7]Ibid.

independently of technological considerations or the question of deterrence. It would also undermine the treaty since the decision on the [illegible] would only have been moved on [illegible]. However, it is significant that the Soviet Union never discusses the U.S. nonweapons capable of carrying bombers as they always bring up mention of the Backfire in the build-up and the pressures being made to constrain theater modernization. Nuclear deterrence, of course, must be an effective restraint of the weapons themselves.

Nevertheless, because of the changed circumstances of Cuba [illegible] Kennedy's decision, [1] characterized the stability in 1962 as being by "an already-known and present danger," [2] and described the "secure, but severely ordinary [illegible] of Communist missiles--in no sense will serve to deter a serious and [illegible] calculatedly [illegible] action by the [illegible] of the weapons themselves" as unacceptable to the United States. [3] Secretary of State Dean Rusk believes that the "immediate objective of the nuclear military balance" was that the Russian leadership would not tolerate any increase comparable to all of their [illegible]

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[1] [illegible] see Leslie Gelb of [illegible] 14, 1981, "The [illegible] of [illegible] Nuclear [illegible]," [illegible], "The [illegible]," p. 12.

[2] [illegible], p. 12.

[3] [illegible].

bases in Cuba] capacity. . . ."[8] He expressed conviction that the evidence left "no doubt that the danger is present and real" and referred to the "urgency of the situation."[9]

A White House statement[10] issued on October 26 reported that the development of missile sites in Cuba was continuing at a "rapid pace" and that activity at the sites was apparently directed at achieving "a full operational capability as soon as possible." It was further stated that missiles previously parked in the open had since been moved to new positions and that cabling had been sighted running from missile-ready tents to nearby generators.[11] This latter information would seem to indicate that the missiles were nearing operational status.

The foregoing statements made by officials of the U. S. Government show clearly that the official public position of the Government was that the threat raised by the rapid construction of offensive weapons facilities in Cuba was extremely urgent. There is no evidence that this official position did not accurately reflect the Government's private assessment of the urgency.

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[8]Statement before the Council of the OAS, October 23, 1962, Department of State Bulletin, op. cit., p. 721.

[9]Ibid.

[10]Press Release dated October 26, 1962, Department of State Bulletin, op. cit., p. 740.

[11]Ibid., pp. 740-741.

The very nature of the weapons being installed, in the circumstances of the hurried construction of their bases and sites, constituted a threat of considerable urgency. It is hard to escape the conclusion reached by the President in his speech of October 22 that their purpose was "none other than to provide a nuclear strike capability against the Western Hemisphere."[12] The official view of the Soviet Union that their purpose was defensive[13] is hard to accept. The claim that medium and intermediate range ballistic missiles and jet bombers could have been stationed in Cuba as a deterrent against possible U. S. attacks on Cuba[14] is also unconvincing. While it is admitted that the defensive or offensive nature of weapons is often a matter of the use to which they are actually put rather than an instrinsic quality, it is, nevertheless, true that reasonable preliminary assumptions can usually be drawn in the case of some particular weapons. This is certainly true in the case of

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[12] Department of State Bulletin, op. cit., p. 715.

[13] Soviet letter to the President of the Security Council on October 23, 1962, UN Document S/5186, cited in United Nations, Yearbook of the United Nations, 1962 (New York: Columbia University Press, 1964), pp. 104 and 111. See also Chairman Khrushchev's message to the President on October 27, Department of State Bulletin, op. cit., pp. 742 and 743.

[14] Quincy Wright, "The Cuban Quarantine," The American Journal of International Law, 57 (1963), 546 and 550.

nuclear weapons systems of mass destructive power. The final conclusion obviously depends on circumstances. In the circumstances of October, 1962, it is difficult to see that this type of weapon, capable of and suitable only for the sudden destruction of virtually all major cities of the Western hemisphere, was necessary for the defense of Cuba.

The area into which the Soviet Union was moving its nuclear weapons is one which has since the formulation of the Monroe Doctrine held a particular interest for the United States--an interest which has been shared by the other American republics for its importance to hemispheric security.[15] There was no legitimate reason for Soviet expansion into this area, with the possible exception of defense of the Castro Government in Cuba, a reason which would not, however, have justified the installation of offensive nuclear weapons. Moreover, the facilities in Cuba would have bypassed American early warning systems for the detection of incoming missiles,[16] thus greatly reducing

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[15]President Kennedy noted this special relationship in his speech of October 22, supra, p. 36. More recent manifestations of the Inter-American concern for the security of the region were shown in the resolutions adopted by the Seventh Meeting of Foreign Ministers of the OAS in 1960 condemning intervention by an extra-continental power in the hemisphere--Department of State Bulletin, XLIII (September 12, 1960), 407--and by the Eighth Meeting declaring that communist governments endangered continued unity and democratic institutions, The American Journal of International Law, 56 (1962), 601 and 604.

[16]Myres S. McDougal, "The Soviet-Cuban Quarantine and

[illegible] evasion evident of more destructive power. The final destructive behavior depends on circumstances. In the disobedience of October, 1962, it is difficult to see that this type of response capable of not bringing only the most minimal destruction to civilians; but the meaning of the [illegible] however, one necessary for the beginning of [illegible]. The more into which the Soviet Union [illegible] missiles analogous to one which fits into the framework of the American role in [illegible] Western viewers--an American which is based by the [illegible] whose described capacities for the importance to maintaining security.[13] Under one or legislative evasion the Soviet [illegible] operation into this area, with the [illegible] acceptance of [illegible] defense of the Soviet Government in Cuba; a withdrawal would not, however, have justified the intervention of offensive nuclear weapons. However, the Kremlin is [illegible] would have applied American early warning evidence for the detection of incoming missiles,[14] thus greatly reducing

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[13]Brzezinski, Alastair Buchan, and Morton A. Kaplan, "Strategy and Arms Control," Foreign Affairs, XXXIX, No. 4 (July, 1961), 607-628. See also Thomas C. Schelling, "Surprise Attack and Disarmament," The American Scholar, XXXI, No. 4 (Autumn, 1962), 636-646.

[14]Alain C. Enthoven, "The Cuban Missile Crisis and Defense

American defensive capability against possible missile and bomber attack. The seriousness of this possibility and the urgency in preventing its accomplishment are made ppparent by the realization that only a few days' delay in taking appropriate measures would have resulted in the missiles being in place and operational, the situation irreversible.[17]

Evaluation of Procedures Available

Of the peaceful means for settling international disputes mentioned in the U. N. Charter, one may be dismissed as virtually irrelevant. That is the alternative of resort to regional agencies or arrangements. Although the Cuban quarantine was based on OAS action, this action was not in the nature of peaceful settlement. Nor was the situation one which would have been appropriate for regional action along lines of pacific settlement since the Soviet Union, a party to the situation, was not a member of the OAS and Cuba was not at the time a participant in OAS activities.[18]

Self-Defense," The American Journal of International Law, 57 (1963), 597 and 601.

[17] Ibid., p. 602.

[18] The Castro Government of Cuba, but not the country itself, was excluded from participation in the Organization of American States by the Eighth Meeting of Foreign Ministers of the OAS at Punta del Este, January 22-31, 1962, The American Journal of International Law, 56 (1962), 601, 611-612.

Prior to October 22, 1962, the Government of the United States had attempted through the peaceful alternative of negotiation to prevent the situation in Cuba from becoming a situation or dispute likely to endanger peace and security. These negotiations were carried on with the Soviet Union since the United States did not at that time have diplomatic relations with Cuba[19] and since it was in reality only the Soviet Union which could have transformed Cuba into a really urgent nuclear threat to the Western Hemisphere. These conversations with the Soviet Union made it clear to the USSR that the United States could not tolerate the presence of offensive weapons in Cuba.[20] Moreover, the Soviet Union had publicly stated that the "armaments and military equipment sent to Cuba are designed exclusively for defensive purposes . . . " and that the USSR had no need "to shift its weapons for a retaliatory blow to any other country, for instance Cuba. . . ."[21] The false Soviet

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[19]Relations were broken on January 3, 1961, Department of State Bulletin, XLIV (January 23, 1961), 103.

[20]President Kennedy publicly warned the Soviet Union on September 4 and 13, 1962, in respect to this. Statements by President Kennedy, September 4 and 13, Department of State Bulletin, XLVII (September 24, 1962), 450; ibid. (October 1, 1962), 481. In his speech of October 22, the President referred to these public warnings and characterized the Soviet build-up in Cuba as in "flagrant and deliberate defiance of . . . [among other things] my own public warnings . . .," ibid. (November 12, 1962), 715.

[21]Quoted by President Kennedy in address of October

assurances of the defensive nature of its weapons build-up in Cuba were reiterated to President Kennedy personally by Soviet Foreign Minister Gromyko just days before the crisis reached a climax. Mr. Gromyko told the President that Soviet assistance to Cuba "pursued solely the purpose of contributing to the defense capabilities of Cuba" and that "if [Soviet assistance in training Cubans in handling defensive armaments] were otherwise, the Soviet Union would never become involved in rendering such assistance."[22] Soviet spokesmen continued to deny in the Security Council the offensive character of the weapons in Cuba even after their intrinsically offensive nature was made public.[23] Thus, the United States had attempted to find a solution to the developing situation through negotiation, but had been unable to do so in spite of Soviet assurances to the contrary.

The duplicity of the Soviet Union in its negotiations with the United States has a particular relevance to the

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22, 1962, Department of State Bulletin, XLVII (November 12, 1962), 715.

[22] Ibid., 716.

[23] "Critical Situation in Caribbean Urgently Considered by Security Council," UN Review, 9 (November, 1962), 6; "Council Adjourns Caribbean Debate for Negotiations," ibid., pp. 8 and 10. Khrushchev still insisted that the weapons were designed "to strengthen its [Cuba's] defensive potential" in his message to President Kennedy on October 27, Department of State Bulletin, XLVII (November 12, 1962), 741 and 742.

evaluation of the prospects for success offered by other peaceful means for settlement of the situation for two reasons. In the first place, the obvious insincerity of the Soviets would have reasonably justified a presumption that equal insincerity would have accompanied any offer or response on the part of the USSR to seek a solution through other means. Second, the clandestine nature of the build-up of weapons in Cuba, nowhere more forcefully illustrated than in the false Soviet assurances that only defensive armaments were being installed in Cuba, greatly added to the justification for an assumption on the part of the U. S. Government that the urgency of the situation necessitated prompt and forceful response. President Kennedy obviously appreciated the importance of this implication when, after pointing out that the United States had never stationed strategic missiles in another country

> under a cloak of secrecy and deception, [he declared that the] secret, swift, and extraordinary buildup of Communist missiles . . . is a deliberately provocative and unjustified change in the status quo which cannot be accepted. . . ."[24]

Thus, the U. S. Government had attempted to find a solution to the situation in Cuba through the peaceful means of direct negotiations with the Soviet Union, but these

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[24]Speech of October 22, 1962, Department of State Bulletin, XLVII (November 12, 1962), 715 and 716.

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[1] Memo of October 21, 1970, Department of State
Archives, Entry [illegible], [illegible].

efforts were unsuccessful, prior to the imposition of naval quarantine, due to the fact that the Soviet Union refused to desist from activities to which the United States strongly objected. Soviet refusal to desist from the weapons build-up was, moreover, accompanied by denials that it was taking place at all. Had the United States sought a solution to the situation through other peaceful means of mutual consent, there is the strong presumption, from prior Soviet dishonesty and secrecy, that no meaningful solution would have been expected. Add to this low degree of expectation for acceptable solution to the situation the urgency of the threat implicit in the weapons build-up and one must conclude that there was no reasonable alternative in the procedures for pacific settlement. Even had the Soviet Union given lip service to agreement for use of any one of these procedures, it would seem most likely that the weapons build-up would have continued at its accelerated pace and that the weapons would likely have become operational before any peaceful means of settlement had run its course. In this respect, it is pertinent to note that, even for a time after the quarantine was proclaimed, urgent work toward making the missile sites operational continued.[25] A halt in the construction of weapons facilities and the withdrawal of

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[25] Supra, p. 37.

the weapons were brought about only after it was apparent that the United States had sufficient military power and had the determination to use it in order to secure removal of the threat in Cuba. Had the U. S. Government relied exclusively on pacific means of settlement, the inference is inescapable that it would have been confronted with the fait accompli of operational nuclear weapons systems installed in Cuba.

The eventual resolution of the missile crisis was accomplished through direct negotiation between the President and Chairman Khrushchev, with the mediatory efforts of U. N. Secretary-General U Thant[26] and without serious military action, but it must be kept in mind that this negotiated settlement was possible only after the threat of military force dictated a decision on the part of the Soviet Union to withdraw its offensive weapons. One cannot be sure what would have been the outcome had military force not been used, but Soviet conduct prior to and immediately after the proclamation of the naval quarantine strongly implies that the weapons build-up would not have been stopped pending application of some alternative not involving the use or threat of force.

The United States might have sought to bring its case

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[26] Supra, p. 3, n. 12, and p. 4, n. 14.

before the Security Council or the General Assembly of the United Nations in preference to the measures which were taken. The long years of frustration since World War II in attempting to deal with the Soviet Union in the U. N. would understandably have led many Americans in October, 1962, to view such alternatives as unpromising and hardly even worthy of serious consideration in a situation where quick results were obviously necessary if they were to be of any real usefulness. Nevertheless, as a part of the totality of the international law which governs all Member States, the U. N. Charter contains important obligations on members with respect to the peaceful settlement of disputes and offers at least the possibility of solution of these disputes through the Security Council and General Assembly.

First, there is the requirement that U. N. members refer disputes which have not been settled by peaceful means to the Security Council.[27] This requirement does not, however, preclude a state from taking other legal measures, including the use or threat of force in legitimate self-defense. Nor does the renunciation of the threat or use of force against another state preclude the resort to legitimate measures of self-defense since only force "against the territorial integrity or political independence" of a state

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[27]Article 37(1).

[illegible]

is forbidden.[28] The United States did, in fact, refer the Cuban situation to the Security Council by calling for an urgent meeting to deal with the Cuban situation.[29] Therefore, the requirement for referring disputes to the Council was satisfied.

But the important question is whether the United States should have relied on the Security Council to provide the settlement or to show the way to a settlement. Viewed from any reasonably objective perspective afforded by the voting formula of the Council, it is clear that there could have been no reasonable grounds for expecting an adequate settlement. The "veto" power would have permitted the Soviet Union legally to defeat any proposed solution of which it disapproved, and the past history of the Soviet willingness to use the "veto" would have led to only one conclusion--that any meaningful proposal for settling the question which would have satisfied the security needs of the American states was of such a low degree of expectation as to be practically a waste of time. The United States could not have been expected to risk a further deterioration in its security by resorting to a time-consuming procedure

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[28]Article 2(4).

[29]State Department Press Release 636, Department of State Bulletin, XLVII (November 12, 1962), 724.

[illegible] (43).

[illegible] Dairy Products Co., 111 Ill. App. 2d [illegible]

which offered only the most remote prospect for acceptable solution of a grave, urgent problem.

Moreover, application to the Security Council for a settlement of the Cuban situation would have ignored the fundamental assumption which led to the inclusion of the "veto" power in the Charter—that collective security under the United Nations system would not be made applicable against a Great Power.[30] The fact that the Soviet Union would have almost surely vetoed any meaningful solution to the Cuban situation—and has in the past blocked important Security Council action by the same device—is not an indication of a failure of the Security Council as an agency for enforcing collective security, but is rather a reaffirmation of the decision made in drafting the U. N. Charter that no such effort would be made against the conduct of a Great Power. The voting formula of the Security Council presupposes that the permanent members must be in agreement if the goal of collective security through Council action is to be accomplished in an effective manner; it implicitly recognizes the inability of the United Nations to take collective

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[30]For a clear analysis of the significance of the "veto" power with respect to aggressive action by a Great Power, see Inis L. Claude, Jr., "The United Nations and the Use of Force," International Conciliation, 532 (March, 1961), 325 and 328. Cf. Leland M. Goodrich and Edvard Hambro, Charter of the United Nations: Commentary and Documents (Boston: World Peace Foundation, 1946), pp. 125-134.

action against a major power. There is, of course, the other side of the same coin--that the United States, as much as the Soviet Union, could not against its will have been the object of Security Council action. It would be absurd seriously to contend that the Security Council would have been a proper avenue to seek either collective security action against the Soviet Union or a legal validation of American action in the Cuban crisis. The Council simply was not endowed by the Charter with the authority to make such an undertaking.

The "Uniting for Peace Resolution" passed by the U. N. General Assembly on November 3, 1950,[31] was designed to fill the void created by the requirement for unanimity of permanent Security Council members and was a reflection of a "new enthusiasm for the idea of collective security"[32] following the experience of apparently successful U. N. resistance to aggression sponsored by a Great Power in the Korean War. "Uniting for Peace" was adopted to provide a way of getting around the difficulty inherent in inaction by the Security Council on vital questions by calling upon the General Assembly to consider such questions and to make recommendations to U. N. members for collective measures, including

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[31]General Assembly Resolution 377(V), text in The American Journal of International Law Supplement, 45 (1951), 1.

[32]Claude, op. cit., p. 358.

the use of force, to enforce the peace. Therefore, the United States might have taken its complaint against Cuba and the Soviet Union to the General Assembly under the provisions of "Uniting for Peace," a right which was granted by the Charter independently of that resolution.[33]

There are, however, serious difficulties in the "Uniting for Peace" approach to U. N. action. In the first place, it must be kept uppermost in mind that any General Assembly "action" is in fact only recommendatory.[34] "Uniting for Peace" is thus, by its voluntarism, merely a "facsimile of an 'ideal' collective security arrangement"[35] and represents a

> scheme, generally resembling a collective security arrangement, that might be utilized even in those situations which the framers of the Charter had thought it prudent to exclude from the impact of official United Nations action.[36]

It cannot be too strongly emphasized that the General Assembly has "no legal power of binding Members by resolutions as to which State is an aggressor, nor indeed, as to what should be done by any Member in a crisis."[37] Therefore, even if the Assembly had been disposed to adopt a resolution

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[33]Article 35(1). [34]Article 11(2).

[35]Claude, op. cit., p. 359. [36]Ibid.

[37]Julius Stone, Aggression and World Order (Berkeley: University of California Press, 1958), p. 164. [Italics in original.]

calling for a solution to the Cuban situation which would have been adequate for the security of the Western hemisphere, it would have been purely a recommendation and would have placed no obligation on the Soviet Union and Cuba to conform and no requirement on any other state to undertake any recommended action. The Soviet Union could have flouted any Assembly resolution with complete legal impunity, as it did in the case of the Hungarian uprising of 1956. Furthermore, and most important to the purposes of this analysis, no General Assembly resolution can give legality to any particular course of action taken by a state or the Assembly itself. Whatever recommendations the Assembly may have made would have been political and not legal. The action recommended would not necessarily even have been legal under international law and most assuredly would not have had any effect on the legality of action taken by a state either in conformity with, or contrary to, the Assembly's recommendations.

A second serious shortcoming in the General Assembly approach to settlement of international conflict is the uncertainty that the Assembly will even act in any effective manner. This uncertainty is more pronounced in the case of Great Power disputes or conflicts. It is, of course, also quite true of the Security Council as well. The bright dawn, beginning in the adoption of "Uniting for Peace," of a

new era in collective security which would be applicable in cases of crisis involving Great Powers proved to be ephemeral.[38] The "Uniting for Peace" resolution represented a "fleeting urge to normalize the abnormality of the Korea experience,"[39] but statesmen soon returned to the earlier view that the United Nations should not take action against a Great Power. The same uncertainty of U. N. action is applicable, though to a lesser extent, to cases of disputes or conflicts among smaller powers. A prime example was the Indian invasion of Goa in 1961. Whatever may have been the moral justice in the Indian action, the fact remains that it constituted as clear a violation of the obligation of U. N. members to refrain from the use of force in international relations[40] as can be imagined. But, the Security Council did nothing of substance to counteract the Indian use of force.[41] The priority in international organization in this century has been given to the prevention of resort to force

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[38]For a discussion of the transformation of the U. N. conception of collective security, see Claude, op. cit., pp. 356-364.

[39]Ibid., p. 364.

[40]Article 2(4).

[41]"Security Council Fails to Act on Use of Force in Goa," UN Review, 9 (January, 1962), 14; United Nations, Yearbook of the United Nations, 1961 (New York: United Nations Office of Public Information, 1963), pp. 129-132.

in preference to the justice of the cause espoused, but the instrumentalities established to oversee this commitment have not always been faithful in ensuring its execution.

One final observation on the possibility of General Assembly action in the Cuban crisis has to do with the Assembly's claim to represent a so-called "conscience of mankind." Julius Stone has warned of the danger of the Assembly's power becoming a protective shield for "predatory and imperialist designs" against the West if, based on this claim and the Assembly's promotion of voluntary action by members "through a regular stacking of votes regardless of the merits, it committed a détournement of the moral authority of that body."[42] There may not appear to be great cause for immediate alarm at the possibility of the Assembly's doing this, but the danger certainly exists and should not be encouraged. An unnecessary willingness to accept General Assembly action as anything more than recommendation which a member may freely and legally ignore, if it so chooses, would only tend to encourage the opportunity for such a diversion of its authority. Only in the most inexact and superficial sense can the Assembly be said even generally to represent a "conscience of mankind," and in specific questions its propensity all too often is to register

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[42]Stone, op. cit., pp. 164-165.

political victories over opponents by roll-call vote rather than to achieve concrete results on matters of genuine substance.

The foregoing is not meant to indict the United Nations for its being unable to offer a reasonable alternative for solution of the Cuban missile crisis. Indeed, it did serve as a highly valuable intermediary in the eventual resolution of the crisis. What is meant is to show that certain constitutional features of the law of the Charter, in the present context of Cold War, preclude the U. N. from being capable of resolving disputes involving Great Powers--a defect which was implicit in the writing of the Charter. It would be highly desirable for any state to be able to turn to an international authority for protection of its security with peace and justice, but that time is not yet.

CHAPTER IV

INTERNATIONAL LAW OF SELF-DEFENSE

Although the case made by the United States Government in support of the Cuban quarantine was not based on its legality as an act of necessary self-defense, it has been shown that the United States and the other American republics were clearly motivated by considerations of defense, whatever may have been their officially stated justification for the action. It remains, therefore, to analyze the law of self-defense and to evaluate the quarantine in terms of this law. For this purpose, it is convenient to divide the analysis into a study of traditional international law in effect prior to the establishment of the United Nations and the law since the adoption of the Charter.

Traditional Law

The right of a nation to resort to forcible measures in self-defense has always been considered a limited right, although in practice appeal has often been made to the right in situations which have clearly exceeded its legitimate exercise. What was to become a classic statement of the right, and the law governing it, is found in the correspondence concerning the Caroline case which arose in 1837.[1] The

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[1]Descriptions of the Caroline incident in William

Criminal Law

Caroline was an American steamer being used to transport supplies and men for rebels engaged in a Canadian insurrection. Since the United States had been either unwilling or unable to put a stop to its activities, the Caroline was boarded in an American port by a group of British troops who set the vessel on fire and let it drift over Niagara Falls. Two men were killed. The United States protested, and the British Government replied that it had acted in necessary self-defense. The controversy dragged out until 1842, with the United States admitting that certain circumstances could justify such action and with Great Britain admitting that extreme urgency must be shown to justify it. Although the two governments differed as to whether circumstances in that case came within the principle of self-defense, Great Britain eventually apologized for the invasion of American territory and the incident was peacefully concluded. In a note of August 6, 1842, the American Secretary of State, Daniel Webster, said in part:

> Undoubtedly it is just, that, while it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the [quoting an earlier communication] "necessity of that self-defense is

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W. Bishop, Jr. (ed.), International Law: Cases and Materials (second edition; Boston: Little, Brown and Company, 1962), p. 777; and J. L. Brierly, The Law of Nations (sixth edition; New York: Oxford University Press, 1963), pp. 405-6.

Carolina was in Mexican hands being used to transport supplies when they were forced to a Mexican hacienda. Since the Texans were not then fully mobilized or ready to put a stop to the activities, the Executive ordered in an American army by a clause of Article Twelve who set the reward on their own if they were taken. Two men were killed. In their place Texans promptly put the British Government's policy that it was better to conserve self-defense. The subsequent struggle was until lately, when the United States abolished that Mexican-Americans could justify their action was with their Mexican-American claims. Although the two governments differed as to whether circumstances in that case were within the principle of self-defense, their diplomatic machinery developed for the purpose of settling their differences and the incident was peacefully concluded. On 9 July of August 8, 1851, the American Secretary of State, Daniel Webster, said in part:

> Undoubtedly it is just, true, only in a strictly that description covering not of the great law of self-defense do exist, there circumstances should be found in which the [illegible] of nations communication. Necessity of that self-defense is

> instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[2]

Given the circumstances justifying the use of force in self-defense, this force should involve nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[3] Webster's words succinctly set forth the limitations of necessity and proportionality which traditional international law has imposed on the recourse to coercive action in self-defense. It is important to note that, although the standard set by Webster was quite restrictive, it did not require actual prior armed attack to justify the resort to force for self protection. Moreover, there is room for significant evolution, under the impact of technological advances in weaponry and of changing concepts in world politics, in the criteria which determine the existence of an "instant, overwhelming" necessity leaving "no choice of means, and no moment for deliberation."

The traditional concept of the right of self-defense seems to have been that of an inherent and overriding

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[2]Webster to Lord Ashburton. Cited by John Bassett Moore, A Digest of International Law, Vol. II (Washington: Government Printing Office, 1906), p. 412.

[3]Webster to Mr. Fox, April 24, 1841. British and Foreign State Papers, 30:193, cited by R. Y. Jennings, "The Caroline and McLeod Cases," The American Journal of International Law, 32 (1938), 82 and 89.

[illegible] overwhelmingly, and society no longer [illegible] means, not to commit war deliberately."[1]

[illegible] give the circumstances justifying the use of force in self-defense, this force should thereby nothing unreasonable or unnecessary since the act, justified by the necessity of self-defense, must be limited by that necessity, as [illegible] clearly states it."[2] Schelter's words essentially set forth the limitations of necessity and proportionality which international lawyers have imposed on the exercise of the inherent right of self-defense. It is important to note, although the examples set by foreign law [illegible] activities, it did not require actual police power attack to justify the resort to force for self protection. However, there is room for significant evolution, under the impact of technological advances in weapons and of changing attitudes in world politics, in the criteria which determine the existence of an "instant, overwhelming" necessity leaving no choice of means, and no moment for deliberation."

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[1] Webster to Lord Ashburton. Cited by John Bassett Moore, 2 Digest of International Law, 412. In "Correspondence between Webster relating thereto, 1842," p. 412.

[2] Webster to Mr. Fox, April 24, 1841. Quoted and [illegible] Webster's words, cited by J. L. Brierly, The Law and Outlook [illegible] International Law, 4th [illegible], p. 421.

right[4] which is applicable to states no less than to individuals.[5] Oppenheim terms the right of self-defense a "natural right both of individuals and of States"[6] and the United Nations Charter (Article 51) refers to it as an "inherent right."

A convincing case has been made for the proposition that the concept of self-defense was originally one with political rather than legal characteristics and that it became legally meaningful only with the attempts to restrict or eliminate the right of resort to war.[7] According to this proposition, self-defense is a right established by postive law and is a right which depends on the illegality of war.

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[4]Herbert W. Briggs (ed.), The Law of Nations (second edition; New York: Appleton-Century-Crofts, Inc., 1952), pp. 984-985.

[5]Brierly, op. cit., pp. 403-4. Brierly points out, however, that self-defense is a legal right, not an instinct as is self-preservation, and that whether or not it is justified is a legal question.

[6]International Law, ed. Sir Hersch Lauterpacht (seventh edition; London: David McKay Company, Inc., 1952), Vol. II, p. 154.

[7]Josef L. Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," The American Journal of International Law, 41 (1947), 872. Professor Kunz' assertions that the right of self-defense "does not exist against any form of aggression which does not constitute 'armed attack'" and that the "threat of aggression" does not justify self-defense are less convincing, ibid., p. 874. See infra, pp. 72-75.

It certainly seems reasonable to conclude that legal justification need not have been required in support of defensive measures involving the use or threat of force when the ultimate in force, war itself, was not considered illegal. Nevertheless, in pre-World War I years, at a time when war was not considered illegal, nations frequently invoked the justification of necessary self-defense in support of their military operations. If the wars they conducted were in themselves legal or extra-legal, the plea of self-defense must actually have been raised as a political justification.

The Twentieth Century has witnessed an emphasis in emerging concepts of international law away from the distinction of justifiable war to that of legal war; peace and security have been sought in preference to justice.[8] The Covenant of the League of Nations distinguished between legal and illegal wars and forbade the latter. The Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact),[9] signed in Paris on August 27, 1928, renounced war for the solution of international controversies and as an instrument of national policy and

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[8]Josef L. Kunz, "Bellum Justum and Bellum Legale," The American Journal of International Law, 45 (1951), 528.

[9]Department of State, Papers Relating to the Foreign Relations of the United States, 1928, Vol. I (Washington: Government Printing Office, 1942), pp. 153-157.

to mediate among competing claims that local leaders
thought were not being pursued in pursuit of parochial
economic activities that do not in itself do more than appro-
priate in theory, and finally, the non-combatant attempt,
nonviolence, in pro-morio for I (peace), of a time when war
will not considered illegal, because diplomacy (namely the
justification of necessary intervention to support or main-
military operations. It has been only considered when in
transition legal or socio-legal, and time of anti-defense
must essentially have taken action as a political legitimation.

The Peaceful Century has witnessed an emphasis in
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tinction of justifiable war to that of legal self defense and
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[8] Cited in Quincy Wright, The Outlawry of War and the Law of War, 47 Am. J. Int'l L. 365 (1953).

[9] Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 2 Bevans 732.

provided for the settlement of all disputes or conflicts of whatever nature or origin only by "pacific means." The signatories to the Treaty were generally agreed that, in spite of the Pact's sweeping prohibition on war, the rights of legitimate self-defense were not precluded[10] and seemingly that each state was delegated the right of determining the necessity for resort to force in self-defense. Statements by the American Secretary of State, Frank B. Kellogg, are indicative of this attitude. In a note to the other principal Foreign Offices on June 23, 1929, he stated that the United States Government

> believes that the right of self-defense is inherent in every sovereign state and implicit in every treaty. No specific reference to that inalienable attribute of sovereignty is therefore necessary or desirable.[11]

In an earlier note written during the drafting of the Pact to the Ambassador to France, Mr. Herrick, the Secretary of State declared:

> There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. . . . Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.[12]

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[10] Julius Stone, Aggression and World Order (Berkeley: University of California Press, 1958), p. 32.

[11] Department of State, op. cit., p. 91.

[12] Ibid., p. 36.

But Mr. Kellogg seemed to expect that a nation's decision to invoke the right of self-defense would be subject to subsequent review and adjudication when he added, "If it has a good case, the world will applaud and not condemn its action."[13]

Naturally, a concept which allows a state to decide in the first instance whether or not resort to force is justified on grounds of "necessary self-defense" is subject to abuse, and has, in fact, often been abused. It was on these grounds that Germany attempted to justify its invasion of Belgium in 1914 and of Norway in 1940, for example.[14] The Nuremberg Tribunal dealt with such abuse when it said the following with respect to the invasion of Norway:

> It was further argued that Germany alone could decide, in accordance with the reservations made by many of the Signatory Powers at the time of the conclusion of the Briand-Kellogg Pact, whether preventive action was a necessity, and that in making her decision her judgment was conclusive. But whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced.[15]

The language of the Tribunal's decision clearly contemplates the necessity for a determination, subsequent to

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[13] Ibid.

[14] Briggs, op. cit., p. 985.

[15] International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, The American Journal of International Law, 41 (1947), 172 and 207.

the end of hostilities, as to the validity of claims raised justifying resort to force on the basis of "necessary self-defense." It seems just as clearly to imply that the initial judgment as to the necessity is the prerogative of the state threatened. But this does not help very much; it does seem obvious that the task of ensuring the subsequent adjudication of claims of self-defense remains almost as difficult as it ever was. Without questioning the decisions of the Tribunal or the propriety of such trials generally, one still must conclude that the example of Nuremberg only illustrates a fact which was never in doubt in the first place—that a state or coalition of states, victorious in war, can impose adjudication on the defeated state or states. In the present context of international politics and the voluntaristic nature of the world legal system, it is doubtful that adjudication of claims of self-defense could be undertaken except in the aftermath of another world war or in the unlikely event of agreement among the states involved. Political review of such claims by the United Nations is only slightly more likely and must be considered probable only in situations not involving any of the Great Powers or a lesser power having the support of a Great Power.

Furthermore, the concept of permitting each state to make the initial determination, subject to possible subsequent adjudication, as to the necessity for resort to force

in self-defense is still open to the same dangers of abuse in the evaluation of what constitutes "instant, overwhelming" necessity and the limits of force which involves "nothing unreasonable or excessive." The dangers inherent in this concept of self-defense are great, but they cannot be wished away. The only way the situation can be completely alleviated is to bring about a significant change in the distribution of the power to enforce law. "The national state might remain, but it could no longer be the principal--let alone the sole--custodian of the instruments of violence."[16] Since such a transformation is at present--and for the foreseeable future--unlikely to be accomplished, we will have to make the best of the institutions and legal tools available to us.

The Nuremberg Tribunal added further support to the doctrine of self-defense as prescribed by Danial Webster when it stated:

> It must be remembered that preventive action in foreign territory is justified only in case of "an instant and overwhelming necessity for self-defense leaving no choice of means, and no moment of deliberation."[17]

It therefore seems accurate to describe the

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[16]Robert W. Tucker, The Just War (Baltimore: The Johns Hopkins Press, 1960), p. 133.

[17]International Military Tribunal (Nuremberg), op. cit., p. 205.

traditional law of self-defense effective prior to the adoption of the United Nations Charter as embodying the elements of necessity for response, proportionality of that response undertaken by the target state, permissibility of unilateral decision as to the necessity for response and its proportionality, and subsequent review and adjudication of this initial decision. As has been observed, this last element is, at best, uncertain of fulfillment, but its importance in the assessment of the legality of resort to force in self-defense, specifically in this analysis of the Cuban quarantine, is not thereby diminished.

As was noted above, the test first formulated by Daniel Webster to ascertain the justification of a claim of necessary self-defense did not require that actual armed attack precede response by force on the part of the target state. However, the criteria are quite strict and narrow, if taken literally. In fact, if applied in a dogmatically literal manner today in a serious political and military confrontation of the nature of the Cuban missile crisis carrying with it the urgency of the possibility of instantaneous nuclear holocaust, the effect would be virtually to impose paralysis in reacting to a serious threat. In an era with the possibility of "nuclear blackmail" a state could lose a war and its political independence without a shot being fired if it were content to abide by the letter of a

strict interpretation in Nineteenth Century terms of that degree of necessity prescribed by Webster. But it is not necessary to insist on such a literal interpretation. International law never required that a victim of attack await the first blow before responding for the very reason that such a requirement might have caused disaster or irreparable damage. If such was the reason over a century ago, it must still be the only valid reason for the right of self-defense. That right must be capable of sustaining its raison d'être today, no less than yesterday. Therefore, it must follow that the right of self-defense must be interpreted today in such a manner that its objective can be achieved. A broad formulation of this right, as established by traditional practice, has been described as authorizing

> a state which, being the target of activities by another state, reasonably decides, as third-party observers may determine reasonableness, that such activities imminently require it to employ the military instrument to protect its territorial integrity and political independence, to use such force as may be necessary and proportionate for securing its defense.[18]

This formulation does no violence to the thought and intention of Webster; it merely expresses them in language more appropriate to the contemporary political and military

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[18]Myres S. McDougal, "The Soviet-Cuban Quarantine and Self-Defense," The American Journal of International Law, 57 (1963), 597-598.

situation. Professor McDougal has undertaken a systematic appraisal[19] of features of the context of the particular events to which the United States reacted in the Cuban crisis as a means of determining the conditions of necessity facing the United States. These features were considered under the following category headings: participants, objectives, situation, base values, strategies, and outcomes. His conclusion was that a third-party observer "could reasonably conclude that the action taken by the United States was in accord with traditional general community expectations about the requirements of self-defense."[20]

Clearly the danger inherent in the build-up of offensive weapons in Cuba was great and the urgency real.[21] While the completion of the installation of the weapons systems in Cuba would not necessarily have made attack imminent, it would have caused, at the very least, irreparable damage, if not disaster, to the status of American security. Installation of the offensive weapons on Cuban territory would have radically altered the international power structure to the detriment of the United States and the rest of the free world. The Soviet Union would have achieved a greater victory, without actual war, than many aggressors in the past

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[19] Ibid., pp. 601-3. [20] Ibid., p. 603.

[21] See supra, pp. 35-40.

have sought through overt aggression. The threat of early accomplishment of such a profound shift in world power relationships, of such a major victory without firing a shot, would seem to have certainly justified the resort to forcible measures by the American republics in legitimate self-defense. To deny the right in a case of such obvious danger, in the present context, would deprive the historic right of much of its value.

The second test of traditional international law to be applied to the Cuban quarantine is that of proportionality. Essentially, the test of proportionality requires that an offended state use only such means as are necessary to induce the offending state to forego its offending conduct and which are proportional to the offense committed. In its negative formulation, the requirement specifies "that acts taken in self-defense may not be disproportionate to the danger threatened, and that they will prove disproportionate if they exceed in manner or in purpose the necessity provoking them."[22] This requirement is subject to abuse by states invoking the claim of self-defense as serious as the abuse to the right itself,[23] but this fact need not be of concern here unless it can be shown that the quarantine of Cuba was a disproportionate action.

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[22]Tucker, op. cit., p. 128. [23]Ibid., pp. 128-131.

The objective of the quarantine was simply to defeat the Soviet Union's efforts to overthrow the existing power structure in the Western hemisphere and to install a powerful military threat within that structure. It sought no change in the status quo and posed no threat to any nation. The naval quarantine itself was a selected interdiction[24] of specified types of offensive weapons and was carried out in a limited area of the high seas adjacent to but outside Cuba's territorial waters. While it is obvious that the success of the quarantine was dependent on the willingness and ability to use force in support of it, if that had been necessary, careful steps were taken to ensure that such force would have been as a last resort and strictly limited. The proclamation instituting the quarantine provided that

> force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.[25]

Secretary of State Dean Rusk described the proportionality of the quarantine by stating that the United

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[24]Text of the Presidential Proclamation entitled, "Interdiction of the Delivery of Offensive Weapons to Cuba," in Department of State Bulletin, XLVII (1962), 717; and The American Journal of International Law, 57 (1963), 512. See also Appendix B, infra, pp. 114-117.

[25]Supra, p. 2, n. 7. See also Appendix A, infra, p. 110.

The objective of the quarantine was simply to defeat the Soviet Union's efforts to overthrow the existing power structure in the Western Hemisphere and to install a pro-Soviet military threat within that structure. It sought no change in the status quo vis-à-vis the Soviet Union. The naval quarantine itself was a selected interdiction of specified types of offensive weapons and was carried out in a limited area of the high seas adjacent to but outside Cuba's territorial waters. While it is obvious that the success of the quarantine was dependent on the willingness and ability to use force in support of it, it need not have necessarily. Certain people were ready to insure that such force would have been or a last resort, not arbitrarily initial. The proclamation instituting the quarantine provides that force shall not be used except in case of failure of refusal to comply with directions, or with stipulations or directives of the Secretary of Defense issued pursuant under, after reasonable efforts have been made to communicate them to the Vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.[23]

Secretary of State Dean Rusk described the "unanimity

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[23] Text of the Presidential proclamation entitled "Interdiction of the Delivery of Offensive Weapons to Cuba," in Department of State Bulletin, XLVII (1962), 557. See The American Journal of International Law, LVI (1962), 557 (1963), 563. See also Appendix B. Ibid., pp. 114-117.

[24] Ibid., p. 3, p. 7. See also Appendix, Ibid., p. 130.

States must tailor its response, "individually and collectively, to the degree and direction of the threat . . . " and would accomplish its "purposes with the appropriate and necessary use of force and with necessary opportunity to remove this grave threat by means other than general war."[26]

In short, the objective of the quarantine was the limited one of requiring the removal of the offensive threat from Cuba and the means used to accomplish this were strictly limited to that degree of force, or available force, necessary to bring about the removal. Therefore, the quarantine must be regarded as having been proportionate to the situation.

The inadequacy under existing law of procedures for the subsequent review and adjudication of claims of self-defense is well known. There was no judicial review of the legality of the quarantine, although there was, in a limited sense, political review of its propriety by the organs of the United Nations. It should be kept in mind that the United States did not base its case for the quarantine on a claim of necessary self-defense, so the only review which its position would have anticipated was that concerning the question of Security Council authorization for regional

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[26]Statement before special meeting of the Council of the O.A.S. on October 23, 1962, Department of State Bulletin, XLVII (1962), 720 and 721.

peace-keeping functions taken under Article 53 of the Charter.[27] Therefore, only the most superficial investigation and review of the quarantine action was actually undertaken and this was of a political nature rather than a judicial inquiry.

International law of self-defense has always recognized the right of a target state to make the initial judgment, subject to subsequent review, as to the necessity for resort to forcible measures in self-defense. Therefore, the United States and the other American republics were justified in taking the initiative in the face of a grave, immediate threat to their security. It is an important aspect of the quarantine that it was a carefully-measured, easily reversible step which in no way prejudiced the possibility of subsequent judicial or political investigation. The course of action taken by the Security Council in not adopting a Soviet Union resolution condemning the quarantine[28] and instead in choosing to facilitate a negotiated settlement of the crisis constituted, in a political sense, tacit refusal to condemn the initial judgment made by the American republics.

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[27] Supra, pp. 22-29.

[28] United Nations, Yearbook of the United Nations, 1962 (New York: Columbia University Press, 1964), pp. 104-111.

The Law of the United Nations

Whatever may have been the rules of traditional international law concerning the right of self-defense prior to the era of the United Nations, it is today necessary to evaluate these rules in the light of Charter provisions. The only reference to self-defense in the Charter is contained in Article 51[29] which reserves the "inherent" right of individual and collective self-defense in case of armed attack on a member as an interim measure until the Security Council has acted to maintain peace and security. Paragraphs 3 and 4 of Article 2[30] are also relevant. The former obligates members to settle disputes by peaceful means and the

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[29]"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." The American Journal of International Law Supplement, 39 (1945), 190 and 201.

[30]"3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

"4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Ibid., p. 191.

The Use of the Veto Weapon

However many more such days of international intoxication the right of self-defense prior to the end of the United Nations may be, it is only necessary to evaluate these evils in the light of their possible, the only reference to self-defense in the Charter is contained in Article 51.[19] Which reserves the "inherent right of individual and collective self-defense in case of armed attack on a Member" in order to invoke measures until the Security Council has acted to maintain peace and security. Paragraphs 3 and 4 of Article 2[20] are also relevant. The former obligates members to settle disputes by peaceful means and the latter obligates members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.

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[19] Reading in the present Charter that limits the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." The complete Journal of International Law Society, 39 (1945), 190 and 204.

[20] "4. All Members shall refrain in their international relations by peaceful means in such a manner that international peace and security, are not endangered.

"3. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." Ibid., p. 181.

latter requires them to refrain from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with U. N. purposes and principles.

Some writers have concluded that the language of Article 51 limits the right of self-defense, individual or collective, to cases involving resistance to "armed attack."[31] From this interpretation of the Charter, it was possible to conclude that "the United States resorted to a . . . forcible action [in the Cuban quarantine] which cannot be reconciled with its obligations under the United Nations Charter. . . ."[32]

It is submitted, however, that such an interpretation of the U. N. Charter is not necessary.[33] Clearly, Article

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[31]Oppenheim, op. cit., p. 156; Briggs, op. cit., p. 986; Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," op. cit., p. 878; Quincy Wright, "The Cuban Quarantine," The American Journal of International Law, 57 (1963), 546 and 560; Philip Jessup, A Modern Law of Nations (New York: MacMillan and Company, 1948), p. 166; Hans Kelsen, Principles of International Law (New York: Rinehart and Company, 1952), p. 61.

[32]Opinion expressed by Quincy Wright as reported in "Law and Conflict: Changing Patterns and Contemporary Challenges," Proceedings of the American Society of International Law, 57 (1963), 1 and 9-10.

[33]Myres S. McDougal and Florentino P. Feliciano, Law and Minimum World Public Order (New Haven: Yale University Press, 1961), pp. 232-241; J. L. Brierly, The Law of Nations (sixth edition; New York: Oxford University Press, 1963), pp. 416-421.

51 does reserve to states the right to resort to force or threat of force in self-defense in case of "armed attack." In fact, it refers to this right as an "inherent right." But that is not the same thing as forbidding the exercise of a similar right under different circumstances. To reaffirm one specific customary right does not necessarily restrict another customary right. Indeed, it would seem that the customary right of a state to resort to force in self-defense in situations of necessity which is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" remains unimpaired unless it has been specifically modified by the Charter. The very term "inherent right" suggests that the right of self-defense is a fundamental one and is not restricted or qualified unless the U. N. Charter has done so. Article 51 certainly does not modify the right.

Proponents of the restrictive interpretation of Article 51 of the Charter are substituting for the words "if an armed attack occurs" the meaning "if, and only if, an armed attack occurs." This meaning is not warranted, and the fallacy in it has been described in the following way: "A proposition that 'if A, then B' is not equivalent to, and

does not necessarily imply, the proposition that 'if, and only if, A, then B.'"[34]

Article 51 of the Charter was introduced into the Charter at San Francisco largely due to the insistence of the Latin American republics as a means for making regional defensive organizations compatible with the peace enforcement powers and responsibilities of the United Nations.[35] There seems to be no evidence that there was any expectation that this new provision would in any way alter the traditional right of self-defense.[36] It seems to have been a case of including Article 51, with its somewhat ambiguous language, as a way of accommodating regional security agreements within the United Nations system and of having no intention, and giving little thought, to restricting the traditional right of self-defense. There is, however, elsewhere in the travaux préparatoires some evidence that the conferees at San Francisco had no intention of altering the

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[34]McDougal and Feliciano, op. cit., p. 237, n. 261. [Italics in original.]

[35]Department of State, Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (Washington: Government Printing Office, 1945), pp. 101-8.

[36]Work of Committee 4 of Commission III, United Nations, Documents of the United Nations Conference on International Organization, Vol. XII (New York: United Nations Information Organizations, 1945), pp. 663-866.

does not necessarily imply, the description that 'A' and only 'A', when H_1.[34]

Article 51 of the Charter was introduced into the Charter at San Francisco largely due to the insistence of the Latin American republics as a means for making regional defensive arrangements compatible with the peace enforcement powers and responsibilities of the United Nations.[35] There seems to be no evidence that there was any expectation that the new provision would in any way alter the traditional right of self-defense.[36] It seems to have been a case of including certain [illegible] with its commonly understood language, as a way of accommodating regional security arrangements within the United Nations system and of having no intention, and giving little thought, to restricting the traditional right of self-defense. There is, however, disagreement in the [illegible] from evidence that the conference at San Francisco had no intention of altering the

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[34] Nogueyrol and Feliciano, op. cit., p. 347, n. 241. Italics in original.

[35] Department of State, Report to the President on the Results of the San Francisco Conference by the Delegation of the United States of America, The Secretary of State (Washington: Government Printing Office, 1945), pp. 101-4.

[36] Work of Committee 4 of Commission III, United Nations, Documents of the United Nations Conference on International Organization, Vol. XII (New York: United Nations Information Organizations, 1945), pp. 505-507.

traditional right of self-defense. In a report which was approved by the Conference, the following statement was made concerning this right, ". . . the unilateral use of force or similar coercive measures is not authorized. The use of arms in legitimate self-defense remains admitted and unimpaired."[37]

Any evaluation of the legal right of self-defense and, more specifically, the legality of the Cuban quarantine must take into consideration the obligation of United Nations members to refrain from the threat or use of force. This obligation is contained in Article 2(4) of the Charter[38] and the prohibition of the threat or use of force applies as "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." It should be noted that this renunciation of the use of force in international relations is far from complete.

Thus, any resort to the use or threat of force directed against a state's territory or political independence or otherwise inconsistent with U. N. purposes is illegal under the law of the Charter, claims of necessary self-defense notwithstanding. It is, of course, difficult to imagine a resort to force in legitimate self-defense

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[37] Ibid., Vol. VI, p. 459. [38] Supra, p. 71, n. 30.

and not exceeding the limits of proportionality which could be violative of Article 2(4). The great value of Article 2(4) in respect to the right of self-defense is that it is one guideline which can be used in evaluating the necessity for and proportionality of measures taken on the claim of self-defense. It certainly does not in itself forbid resort to the threat or use of force in legitimate self-defense.

However, the criticism has been made by Professor Quincy Wright[39] that the Cuban quarantine violated Article 2(4) in that it was a threat of force directed against the Soviet Union's vessels on the high seas and as such constituted a threat of military force to induce the Soviet Union to change its policy or to abandon its rights. This he equates to a violation of that state's "political independence."[40] In arriving at this conclusion, he refers to the quarantine as depriving the Soviet Union of "its right to 'freedom of the seas'" and its "right to navigate the high seas,"[41] and equates Soviet activities in Cuba to "trade . . . in time of peace."[42] This choice of terms, bordering on the naive, fails to take note of the true nature of this

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[39]"The Cuban Quarantine," op. cit., p. 546.

[40]Ibid., pp. 556-557.

[41]Opinion reported in "Law and Conflict: Changing Patterns and Contemporary Challenges," Proceedings of the American Society of International Law, 57 (1963), 1, 9-10.

[42]"The Cuban Quarantine," op. cit., p. 549.

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"trade" and applies an interpretation of "political independence" broader than the plain and natural meaning of the Charter requires.

In spite of Professor Wright's belief that a "common-sense interpretation"[43] would characterize threat of military force against a state's vessels at sea as violating that state's political independence, it seems more reasonable to define such a violation in terms of political subjugation or domination, not necessarily by political or military means. To induce a government to change a policy, even if by a threat of force, is quite different from subjection of that state to outside political domination. In this sense, the quarantine was clearly not a threat to the political independence of either Cuba or the Soviet Union, since it had as its sole purpose requiring the removal of offensive weapons from Cuba and the prevention of importation of additional weapons.

Furthermore, in establishing the quarantine, the United States was hardly interfering with the Soviet Union's right to freedom of the seas in conducting trade in time of peace. It was not trade which the United States sought to keep out of Cuba, but offensive weapons the nature and deployment of which constituted a threat to international

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[43] Ibid., p. 557.

diplomacy at which Castro excels is largely a function of the

peace and security in violation of Article 1(1) of the U. N. Charter. It would be ironic, indeed, if a nation were expected to sit idly by and see its security threatened and the peace of the world endangered by another state which had fewer scruples about violating United Nations obligations. Such would have been the case in the Cuban missile crisis if excessively broad interpretations of "trade" and "political independence" were valid.

Finally, under Article 2(4) there is the prohibition of the threat or use of force in any other manner inconsistent with the purposes of the United Nations. These purposes are set forth in Article 1 of the Charter and include the maintenance of international peace and security, the development of friendly relations among nations, the achievement of international cooperation, and serving as a center for harmonizing the actions of nations. It is hard to see how the quarantine, in the circumstances of the Cuban situation and with the alternatives available, could be considered to have been inconsistent with these purposes. It is certainly true that the quarantine contemplated the use of force had that been necessary and that such use of force would have endangered international peace, but it is only slightly less obvious that the successful completion of installation of the offensive weapons systems in Cuba by the Soviet Union would have been a more serious threat to

international peace and the security, particularly, of the American republics. The conspiracy of the Soviet Union and Cuba to install the weapons in the Western hemisphere was itself a clear threat to international peace and security, hence a violation of Article 2(4) as inconsistent with U. N. purposes; the quarantine was such a threat only to the extent that peace and security would have been endangered had the Soviet Union refused to desist from its provocative and illegal action. It might be instructive to speculate as to how well the purposes of the United Nations would have been served by a failure on the part of the United States and the other American republics to react to the threat or to have reacted in some fashion offering less prospect for success.

Article 2(3) of the Charter obligates each member of the United Nations to settle disputes by peaceful means in such a manner so as not to endanger peace, security, and justice. The establishment of a quarantine was hardly a "peaceful means" since it depended on the availability and use of military force, if needed, in order for it to have succeeded in its objective. It need not otherwise be shown that the American course of action was consistent with Article 2(3) if the claim of necessary self-defense is valid. As has been pointed out, military necessity created a situation not allowing further recourse to the time-consuming

procedures of negotiation and appeal to the United Nations,[44] procedures which offered little prospect for success anyway.[45]

The decision of the International Court of Justice in the Corfu Channel case[46] has considerable relevance to the subject of the law of self-defense since it was delivered subsequent to the coming into force of the United Nations Charter. In upholding the right of innocent passage for warships in time of peace, even when such passage was carried out as a means of asserting this right by warships which were at battle stations and fully prepared to retaliate if fired upon, the Court seemed to justify the following assumptions:[47]

1. The existence of a general principle that a state may uphold a right which is being unjustly denied, and

2. The legitimacy of preparations for the immediate resort to forcible measures of self-defense in the event of attack while upholding a legal right.[48]

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[44] Supra, pp. 35-40. [45] Supra, pp. 40-53.

[46] "The Corfu Channel Case (Merits)," International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1949 (Leyden, Holland: International Court of Justice, 1949), pp. 4-172; Decision and digest of dissenting opinions in The American Journal of International Law, 43 (1949), 558.

[47] Brierly, op. cit., pp. 424-425.

[48] These extrapolations have been criticized on the

With respect to the latter assumption, the Court did not specifically state that the actual resort to force would be legitimate in case of attack, but since the British warships involved were under orders to fire back if attacked, it certainly must have felt so, or it could not have found the passage of the warships to have been innocent.[49]

If these foregoing conclusions are valid inferences from the Court's decision, they are of considerable relevance to the broad subject of self-defense and to the specific question of the legality of the Cuban quarantine. In the broad view, a philosophy which permits the use of a threat of force--as clearly was the case with the passage of battle-ready British warships through Albanian territorial waters--to uphold a legal right, would surely permit the use or threat of force in self-defense of the security of a nation. It would not be inappropriate to point out that national security is a more fundamental right of a state than that of innocent passage for its vessels at sea.

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ground that the conclusions reached by the Court were too narrowly drawn and that the requirement of a "certain degree of consequentiality in the values sought to be conserved" is an effect of the principles of necessity and proportionality. McDougal and Feliciano, op. cit., pp. 226-228. The latter criticism would seem not to be applicable to the Cuban missile crisis for the reason that the values sought to be conserved were "indispensable components of . . . 'territorial integrity' [and] 'political independence.'" Ibid., p. 227.

[49]Brierly, op. cit., pp. 424-425.

The Corfu Channel case is quite similar to the Cuban crisis in the important respect that in neither case was there an effort made to settle the dispute by arbitration or other peaceful means as provided for under Article 2(3) of the United Nations Charter. If it can be asserted that the urgency of the situation in the Cuban confrontation did not allow the time for such means, the same justification can hardly be made for Great Britain's actions in the Corfu Channel. Prior to the incidents of October, 1946, which subsequently led to adjudication before the International Court of Justice, neither Great Britain nor Albania ever suggested that the legal question involved be submitted to arbitration or to any other peaceful means of settlement.[50] The only reasonable inference to be drawn from this is that the Court sanctioned the resort to threat or use of force in upholding a legal right, even without a prior effort to achieve settlement through peaceful means other than bilateral diplomatic discourse. It is but a short, obvious step to the conclusion that a state may legally resort to the use of force in self-defense against another state which threatens the security of the former without first attempting to find a solution to the dispute through pacific means, provided that the urgency is great enough.

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[50] Ibid., p. 429.

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CHAPTER V

IMPLICATIONS FOR A MODERN DOCTRINE OF SELF-DEFENSE

The experience of the Cuban quarantine revealed the inadequacy, in the present international quasi-order, of adherence to a restrictive interpretation of the right of self-defense limited to response to actual armed attack. Self-defense is a right available to "states no less than to individuals,"[1] but in the context of an international system which offers only limited expectation that community institutions will be able and willing to protect its members, it is only a realistic recognition of the facts of life that leads to the conclusion that international law must permit to states an even broader interpretation of what constitutes necessity for invoking the right. If it were otherwise, the doctrine would fail to serve "its basic policy function in conservation of human and material values"[2] since the present development of weaponry and technology would mean

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[1] J. L. Brierly, The Law of Nations (sixth edition; New York: Oxford University Press, 1963), pp. 403-4.

[2] W. T. Mallison, Jr., "Limited Naval Blockade or Quarantine-Interdiction: National and Collective Claims Valid Under International Law," The George Washington Law Review, 31 (December, 1962), 335 and 355.

that waiting for armed attack before resorting to measures in self-defense would make any defense of doubtful value.

Effect of Modern Technology and Weaponry

The Cuban missile crisis is illustrative of an important change in the requirements of an adequate interpretation of the right of self-defense--an interpretation which makes it militarily feasible for the purpose of the right of self-defense to be served. These changes brought about by the present state of technology and weaponry require a very different interpretation of the criteria for self-defense formulated by Daniel Webster as "necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation" and a response involving "nothing unreasonable or excessive."[3] This is not to question the continued validity of Webster's requirements of necessity and proportionality, but only to observe that the conditions which may constitute "necessity" have undergone an important transformation. At the time of the Caroline incident, a nation could have afforded to await the first strike in an armed conflict without exposing itself to irreparable damage before responding to the threat, but this was not required even in that era of unsophisticated weaponry. Traditional international law has always recognized the right of a state

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[3]Supra, p. 57, nn. 2 and 3.

[illegible] waiting for [illegible] resulting in massive
to self-defense could have any bearing on General Vatsa.

Effects of Modern Technology and Weaponry

The Court [illegible] entails is illustrative of an important change in the [illegible] of an [illegible] interpretation of the right of self-defense--an interpretation which makes it militarily feasible for the people of the right to self-defense to be exercised. Many savages accept death by the greatest ease; a technology can compel [illegible] a very different interpretation of the criteria for self-defense sponsored by Courts serving to [illegible] of self-defense; [illegible], resulting in [illegible] moment for deliberation" and a [illegible] involving [illegible] or recovery.[1] This is not to question the continued validity of reasons [illegible] of necessity and proportionality, but only to observe that the conditions which may constitute "necessity" have changed by improvement [illegible]. In the time of the [illegible] incident, a nation could have [illegible] to repel the first strike in an armed conflict without [illegible] in a [illegible] before responding to the [illegible], but here was not required even in that era of [illegible] recovery. Technical [illegible] has now [illegible] the right of a state

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[1] [illegible], p. [illegible], n. 2 and 3.

to resort to forcible measures in self-defense when the imminence of attack is of such a high degree as to preclude effective resort to non-violent means of meeting the threat.[4] Since it has been shown in Chapter IV that the traditional law concept of self-defense is still valid in essentially its pre-United Nations formulation, it is necessary only to reassert this right interpreted in such a manner that its purpose will still be militarily feasible.

Modern technology has made it possible for a nation to unleash a massive attack of hitherto undreamed-of destructive power against its victim within such a short period of time that defense would be impossible or futile unless undertaken on virtually split-second notice or as an anticipatory measure. It is recognized that advocacy of an anticipatory force in self-defense comes very close to advocacy of preventive war. The risk of confusing the two concepts is accepted, however, on the belief that the former can be distinguished by an urgency which reasonably requires an intended victim to take forcible measures for its own security and by the nature of that response, which must be kept within the limits of the minimum of force which is necessary for ensuring the continuance of security. It is not inappropriate, at this point, again to recall the purpose

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[4]Myres S. McDougal, "The Soviet-Cuban Quarantine and Self-Defense," The American Journal of International Law, 57 (1963), 597 and 598.

of self-defense in order that it be kept in mind that what the right seeks to prevent is potentially much more serious and quite probably more destructive than the limited force which should be employed in its prevention.

The speed of modern missiles and manned jet aircraft is so great and the weapons they are capable of delivering so powerful that it would constitute an act of gross national irresponsibility for a government knowingly to wait until nuclear weapons were enroute to that nation's territory before taking military steps in self-defense. Such an action--or more properly inaction--is an extreme, hypothetical case and one which is not likely ever to take place, but it is a valid statement of the result which could come about from a strict application of the restrictive interpretation of the right of self-defense which holds that Article 51 of the U. N. Charter restricts the right to the use of force to situations involving actual armed attack. Application of the restrictive interpretation might very well mean imposition of delay in responding to a threat until defense would be too late.

> An armed attack in the old days still gave time for defense; an armed attack from a missile base located within short range would make self-defense meaningless; there would be nothing left to defend, if the victim were to await concrete evidence of the attack.[5]

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[5]Charles G. Fenwick, "The Quarantine Against Cuba:

Successful installation of nuclear weapons systems in Cuba in 1962 would have exposed the United States and the rest of the hemisphere to just such a possibility--with a meaningless right of self-defense and nothing left to defend had an attack been initiated. The United States was not required to acquiesce in its being placed in such an untenable military position. There would be little reason to retain the right of self-defense at all if its use is to be so narrowly restricted as to make it militarily impossible to defend one's country against the danger most probably to be raised.

Thus, the danger with which the impending completion of offensive weapons facilities in Cuba confronted the American republics brings home the fact that the right of self-defense "must not be interpreted so narrowly as to induce inaction or defer action until it is too late."[6] The case in support of the view that the traditional international law concept of the right of self-defense has been set forth in Chapter IV. It seems apparent, from the standpoint of modern technology and weaponry, that this right must not only be retained, but that also the determination of what constitutes "necessity" of defense must be made in full recognition of the nature of modern arms. Webster's concept

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Legal or Illegal?," The American Journal of International Law, 57 (1963), 588 and 589.

[6]Mallison, op. cit., p. 355.

[illegible]

of an "instant, overwhelming" necessity is still valid; it is in the realm of the factors which constitute necessity that a transformation has occurred.

It is indeed unfortunate that the implication of the effect of modern technology on the nature of necessity for self-defense is to broaden the field of objective factors which can contribute to that necessity, but it is equally as unfortunate, as it is true, that the consequences of failing to take note of the broadening of that field would be far more serious than at any time in the past.

It is not considered feasible to attempt to define objective factors which would constitute necessity for self-defense for essentially the same reasons that international statesmen have failed to agree on a definition of aggression.[7] It is doubtful that any definition could take into account all possible factors and at the same time prevent the definition from being open to the abuse of aggressors to serve their own ends. As "the notion of aggression is broader than that of aggressive or offensive war,"[8] so too is the notion of self-defense broader than that of response to aggressive or offensive war. The determination of the

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[7]For a brief, concise discussion of the desirability of defining aggression, see Charles de Visscher, Theory and Reality in Public International Law (Princeton: Princeton University Press, 1957), pp. 293-296.

[8]Ibid., p. 295.

validity of claims of "necessary self-defense" will depend on the specific circumstances of each case.

International Regulation of Force in Disputes

The Cuban missile crisis is further illustrative of the yet uncompleted task of the effective regulation of the use of force within the international system. In the simplest terms, the crisis was a confrontation of two Great Powers, each of which was seeking an end which the other wished strongly to frustrate. Neither the United States nor the Soviet Union was legally subject, against its will, to the restraint of any international regulatory agency, although both were subject to the rules of international law. The conduct of the Soviet Union has been criticized as having been in violation of the law of the U. N. Charter[9] and the United States has been criticized elsewhere for having acted illegally.[10] Moreover, a U. S. Government official conceded that "such progress as we have made [toward settlement of the crisis to the satisfaction of the U. S.] cannot, on the whole, be attributed to our legal position."[11] The same official seemed to downgrade the importance of the

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[9] Supra, pp. 77-79. [10] See supra, p. 5, nn. 19-22.

[11] Abram Chayes, Legal Advisor, Department of State, "The Legal Case for U. S. Action on Cuba," address before the Tenth Reunion of the Harvard Law School Class of 1952 in Boston, Massachusetts, November 3, 1962, Department of State Bulletin, XLVII (November 19, 1962), 763.

U. S. Government's legal position when he added: "But if it would not have been enough merely to have the law on our side, that is not to say it is wholly irrelevant which side the law was on."[12]

The preceding facts and opinion are not very encouraging to a world which realizes, through the experience of two world wars and an interminable cold war, the consequences of a failure to attain the effective regulation of force in international relations. But they are, nevertheless, realistic inferences from the contemporary international system. Men dedicated to the concept of "the rule of law" in international affairs--as most Americans would claim to be--will hardly be satisfied with this state of affairs, but they cannot escape the reality of it. Most would welcome the unqualified outlawing of the unilateral resort to arms in international disputes, but they would do well to ensure first that the law will be obeyed and that justice will not be sacrificed to a premature renunciation of arms which would be adhered to only by just men.

It is apparent to the casual observer that individual resort to force has not been eliminated from the world scene. This fact may be attributed to the absence of an effective international organization for enforcing world order[13] or,

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[12] Ibid. [13] de Visscher, op. cit., p. 286.

more fundamentally, to an unwillingness of nations and peoples themselves to accept limitations upon their freedom of action.[14] It could be corrected either through an international authority sufficiently powerful to impose order or through a transformation in the attitudes of states and peoples. The latter would probably be more desirable in the long run, but it would be a long run. The implication would be the same in either case. International relations ordered by law and effectively eliminating individual resort to force must ultimately be accomplished through a monopolization of coercive power, or at least the greater part of it, in an international institution charged with the authority and responsibility for enforcing order. It matters very little for the purposes here whether it is done by international consensus or is imposed.

What we have in the world today is far from what is needed to enforce world order. This is all the more reason why it is vital to ensure that minimum world order will be enforced before we undertake to exclude all forms of force in international relations. Nothing is to be gained by accepting rules of law which only the virtuous will obey. Specifically, the traditional rule of self-defense must be retained until it is certain that it is no longer necessary

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[14]Clyde Eagleton, International Government (third edition; New York: The Ronald Press Company, 1957), p. 583.

[illegible]

to protect legitimate rights. The Cuban missile crisis was an instance in which the United States and the other American republics clearly had no practical alternative to the use of force in self-defense. No other procedure would have offered a reasonable probability of protecting their security in an effective, timely manner. In the context of the present international system and a realistic assessment of the nature and intentions of the adversary, only a determination to maintain their security with military force, if necessary, promised any real prospect for successfully implementing self-defensive measures. The traditional right of self-defense was adequate legal justification for the action undertaken. It is in this type of situation, when international regulatory institutions are incapable of satisfying the just and legitimate security requirements of states, that retention of a realistic doctrine of self-defense is essential.

The Test of Proportionality

The measures taken by the American republics to secure the removal of missiles from Cuba were strictly limited in scope and in application to that which may be regarded as having been the minimum degree of coercion necessary to accomplish the ends sought--the end to the threat being raised in Cuba. Thus, in this respect the

quarantine was in careful and faithful conformity to the requirement of proportionality.[15] In contrast with past occasions when the force invoked for the purpose of self-defense has often far exceeded that minimum of coercion necessary to bring about discontinuation of the offensive conduct, the force applied in the missile crisis was strictly limited to what was necessary to ensure the continued security of the hemisphere. There was no "unconditional surrender" attitude.

No doubt the strongest force in moderating American action against Cuba and the Soviet Union was the possibility that anything more coercive in scope or application would have greatly increased the possibility of a major nuclear war with the Soviet Union. The care with which the United States, and other world powers, have in recent years tempered their actions so as not unnecessarily to provoke a major military response from the Communist bloc was quite apparent in all facets of the American undertaking of naval quarantine. The means employed were strictly limited to the scope of the necessity which prompted American response,

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[15] For a good evaluation of the proportionality of the quarantine, see Carl Q. Christol and Charles R. Davis, "Maritime Quarantine: the Naval Interdiction of Offensive Weapons and Associated Matériel to Cuba, 1962," The American Journal of International Law, 57 (1963), 525 and 540-543.

[illegible]

largely for the reason that any excess of force would have increased the possibility of major Soviet response.

It is also probable that the carefully-measured response to the weapons build-up was due partly to the moderating influence of the collective approach to the situation through the OAS and the weight of world public opinion. It is recalled that the action was taken on the formal basis of action by the Organization of American States and that the United States Government made strong efforts to justify the action before the United Nations and world public opinion. The impact of these forces should not be over-emphasized for it is obvious that they are always less important in determining policy than are considerations of national security. But their effect cannot be denied either. The whole of American conduct in the crisis as manifest in the proportionality of the measures undertaken showed a clear consciousness of, and commitment to, a collective approach to the problem and a course of action which would appeal to the entire world as a moderate response for strictly limited purposes. International organization is still rudimentary and world public opinion is still uncertain and of a doubtful weight in affecting actions taken on the basis of national interest, but the experience of the Cuban quarantine demonstrated that they are factors which have a growing importance in international affairs. This

importance, hopefully, will continue to exercise growing influence in limiting the action taken in self-defense to that level which is consistent with the necessity for response and proportional to the danger threatened.

The right of self-defense is open to the serious abuse that the response to attack or threatened attack will be far in excess of what is necessary to repel the immediate danger, or even to remove that danger. The doctrine formulated by Webster gave no such license and international legal specialists have, over the years, insisted on the requirement of proportionality, but the practice of states has been quite a different matter. An insistence upon "unconditional surrender" or, at a minimum, "victory" has been characteristic of the attitude of absolute defense.[16] Such would still likely be the case in a major war, conventional or otherwise, but the Cuban quarantine revealed--as the Korean experience had earlier shown--that restraints are more likely today to be placed on defensive military operations and that these operations will consequently more likely be proportional to the threat acted against. These restraints are the result primarily of the prudent realization that excess may well result in escalation of the

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[16]Richard A. Falk, Law, Morality, and War in the Contemporary World (New York: Frederick A. Praeger, 1963), p. 16.

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[16]Richard P. Weil, Jr., Deterrence, and Use in the Contemporary World (New York: Columbia U. Press, 1962), p. 16.

conflict into a major war, but the importance of the moderating influences of international organization--universal and regional--and of world public opinion is increasing and should not be overlooked or discouraged.

The Role of Regional Organizations

The Cuban experience was an interesting demonstration of a regional organization's reacting collectively to a threat to its common peace and security. Confronted with the danger implicit in the installation of offensive nuclear weapons systems in Cuba, the Organization of American States acted quickly and decisively in response to that danger.

It is tempting to discount the significance of the OAS action by asserting that the Organization simply rubber-stamped the action proposed by the United States and that the quarantine was not really a collective undertaking since the United States provided the overwhelmingly greater part of the forces committed to the operation. The first assertion is not plausible because of the strong and long-standing suspicion among Latin American nations of any action by the United States which, in any way, seems like "intervention" in another American republic. The fact that the OAS recommended the use of military force, if necessary, to prevent the weapons in Cuba from becoming operational could only be explained by a genuine consensus among the members that their security was in fact threatened. Even with the

conflict into a major war, but the importance of the accelerating influences of international organization--military and diplomatic--and of world public opinion is increasing and should not be overlooked or underestimated.

The Role of Regional Organizations

The Cuban experience has an international dimension of a regional organization's reacting collectively to a threat to its common peace and security. Confronted with the danger implicit in the installation of offensive nuclear weapons systems in Cuba, the Organization of American States acted quickly and decisively in response to that danger.

It is impossible to discount the significance of the OAS action by assuming that the overwhelming steps undertaken would have been taken by the United States in any case. The fact remains that the OAS action preceded by two days the United States quarantine was not merely a collective ratification of the United States position but substantially greater part of the forces committed to the operation. The first assumption among Latin American nations of any action by the United States nation, in any way seems like "intervention" in another American republic. The fact that the OAS decided the use of military force if necessary, to prevent the weapons in Cuba from becoming operational could only be explained by a genuine conviction among the members that their security was in fact threatened. Even with the

circumstances as they were, Brazil, Mexico, and Bolivia abstained from that part of the OAS resolution which recommended the use of armed force,[17] an action obviously reflecting historic Latin American opposition in principle to intervention in the affairs of American states.

It is true, of course, that the major portion of the armed force units used in carrying out the quarantine were provided by the United States, but this is no indication that the other American states were giving less than full support to the quarantine. It was, instead, the practical result of the facts that the United States had the necessary forces immediately available for use in the quarantine and the other nations had only limited forces, most of which were not immediately available.

The collective action of the Organization of American States is significant chiefly for two reasons. First, it demonstrated the ability of regional organizations to act collectively for their own self-defense and, second, it provided a valuable alternative to either unilateral resort to force on a claim of self-defense or appeal to the organs of the United Nations with limited expectation of assistance.

The OAS action was not taken on a formal claim of self-defense, but it was obviously motivated by a feeling

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[17] The New York Times, October 24, 1962, p. 23.

[1] The New York Times, October 11, 1962, p. 32.

that the hemispheric security was threatened and took the same form as a resort to force in self-defense. The significance of the OAS action as a procedure for collective self-defense should not be over-emphasized, however. In the Cuban crisis the threat was more obviously urgent and apparent than it is likely to be in other such cases; without these factors effective OAS action would have been much less likely. Furthermore, had the threat been limited to only one or a small number of states, it would have been less likely that the necessary majority would have conscientiously upheld the principle of collective self-defense by approving the action taken. Regional organizations are subject to the same lapses in devotion to collective security as is the United Nations. A final reservation concerning the significance of the OAS action is the caution with which one should use the Cuban experience to draw any conclusion that regional organizations generally are likely to act effectively in collective self-defense. The American republics have a longer history of association and cooperation than do most other regional arrangements and their ties are generally stronger. That it acted collectively in this specific instance of danger should not be generalized into an assumption that other organizations would act similarly in such circumstances. Given these reservations as to the OAS action, it is nevertheless reasonable to conclude that

the Cuban crisis constituted a valid example of collective action by a regional organization undertaken in self-defense. It is far from an indication that the regional approach is infallible, but it does illustrate the fact that such organizations, because of geographical proximity and common interests, can in some circumstances be a useful alternative to other approaches to security. Since the regional approach is necessarily the result of a consensus among the states concerned, it can be expected that its actions will generally have been more thoroughly reasoned and should, therefore, be less subject to the abuses of the exaggeration of necessity and excess in the means of response. As one of the many available approaches to the quest for international order, regional action in collective self-defense should have a useful place in our means for seeking solutions to threatening situations.

Conclusion

In conclusion, it is proposed that a realistic doctrine of the right of self-defense must take note of a number of relevant factors. First and of primary importance, the doctrine must be consistent with the purposes it is intended to serve. In order for this to be possible, it must recognize the nature of the international legal and political system and the probability that states will be required to fall back on the right of self-defense in order to

the Cuban crisis constituted a valid example of anticipatory action by a regional organization undertaken to self-defense. It is for them an indication that the regional approach is feasible, but it does illustrate how that much organization, because of geographical proximity and common interests, can in some circumstances be a useful alternative to other approaches to security. Since the regional approach is necessarily the result of a consensus among the states concerned, it can be expected that its methods will generally have been more thoroughly reasoned and sounds, therefore, be less subject to the abuses of the employment of necessity and excuse in the nature of reprisals. In one of the many available approaches to the quest for international order, regional action in collective self-defense should have a useful place in the means for meeting deficiencies in threatening situations.

Conclusion

In conclusion, it is proposed that a realistic doctrine of the right of self-defense must take note of a number of relevant factors. First and of primary importance, the doctrine must be consistent with the purposes it is intended to serve. In order for this to be possible, it must recognize the nature of the international legal and political system and the probability that states will be required to fall back on the right of self-defense in order to

maintain their security and political independence. Finally, this doctrine should be consistent with the desire and effort eventually to subordinate the unilateral use of force in international relations to the institutionalized regulation of force in a manner which will ensure the peace and security of all nations through the rule of international law.

The analysis of the Cuban quarantine in terms of the law of self-defense has shown that the law is essentially unchanged, insofar as the right to apply it and the extent to which it justifies the use of force are concerned, since the classic formulation of its terms by Daniel Webster in the last century. The changes in its concept have been largely a matter of the transformation in the nature of the factors which constitute the necessity for its being resorted to. The law of the United Nations Charter altered the concept of the law only by providing procedures which could, in some cases, offer alternatives of peaceful settlement or collective security and apparently by limiting the legal bases for resort to force. It is doubtful if the latter was actually a modification in the concept since it is unlikely that any resort to force which is in violation of the Charter could have been a legitimate act of self-defense.

The doctrine which it is proposed be accepted for the

application of the right of self-defense is necessarily framed in general terms. Man has not yet been able to agree on a workable legal definition of self-defense, or of aggression, and he is not likely to be able to do so, mainly for the reason that the distinction between the two is a matter of circumstances and the degree and type of force employed. While it is probably impossible to define exactly the term "necessary self-defense," it is not necessarily impossible to determine subjectively whether a specific case falls within its permissible limits.

It is suggested that the following be constituents of this doctrine for the application of the legal right of self-defense:

1. The reasonable need, "as third-party observers may determine reasonableness,"[18] for an immediate use of force in the self-protection of a state's territorial integrity, political independence, and national security;

2. The use of force in a measure and to the extent proportional to the danger raised; and

3. The subsequent determination of the validity of the claim to a reasonable need and of the proportionality of the force employed by an impartial authority so empowered.

It is considered that such a doctrine fully complies

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[18]McDougal, op. cit., pp. 597-598.

[16] Bozeman, The Future of Law and Politics, 1965, p. 247-249.

with the present rules of international law applicable to the right of self-defense.

The third of these constituents is obviously the one most unlikely to be realized in the present international quasi-order, but it is the one most essential to the prevention of the entire concept's being abused. The shortcomings of our system in this respect have already been discussed, but it is in order to reiterate the great need for its improvement.

The desire to curb the right of resort to force in international relations is a worthy one, but the right of self-defense must be retained in an effective form until after the ability to resort to force illegally has been effectively denied. The right is open to the possibility of grave abuse, but nothing would be solved by denying it. Only the moral state would be punished. An aggressor may occasionally misuse the plea of necessary self-defense; but if no such right were allowed, he would not thereby be deterred.

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APPENDIXES

APPENDIX A

INTERDICTION OF THE DELIVERY OF OFFENSIVE WEAPONS TO CUBA A PROCLAMATION[1]

WHEREAS the peace of the world and the security of the United States and of all American States are endangered by reason of the establishment by the Sino-Soviet powers of an offensive military capability in Cuba, including bases for ballistic missiles with a potential range covering most of North and South America;

WHEREAS by a Joint Resolution passed by the Congress of the United States and approved on October 3, 1962, it was declared that the United States is determined to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere, and to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and

WHEREAS the Organ of Consultation of the American Republics meeting in Washington on October 23, 1962, recommended that the Member States, in accordance with Article 6 and 8 of the Inter-American Treaty of Reciprocal Assistance,

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[1]Department of State Bulletin, XLVII (November 12, 1962), 717.

APPENDIX A

INTRODUCTION BY THE CHAIRMAN OF CONFERENCE WORKING TO AVOID A CONFLAGRATION[1]

WHEREAS the peace of the world and the security of the United States and of all American states are endangered by reason of the metastasizement by the Euro-Soviet powers of offensive military capability in Cuba, including bases for ballistic missiles with a potential range covering most of North and South America;

WHEREAS by a joint Resolution passed by the Congress of the United States and approved on October 3, 1962, it was declared that the United States is determined to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this Hemisphere, and to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States, and

WHEREAS the organ of consultation of the American Republics meeting in Washington on October 23, 1962, recommended that the Member States, in accordance with Article 6 and 8 of the Inter-American Treaty of Reciprocal Assistance,

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[1] Department of State Bulletin, Vol. LXVII (November 12, 1962), 715.

take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent:

NOW, THEREFORE, I, JOHN F. KENNEDY, President of the United States of America, acting under and by virtue of the authority conferred upon me by the Constitution and statutes of the United States, in accordance with the aforementioned resolutions of the United States Congress and of the Organ of Consultation of the American Republics, and to defend the security of the United States, do hereby proclaim that the forces under my command are ordered, beginning at 2:00 p.m. Greenwich time October 24, 1962, to interdict, subject to the instructions herein contained, the delivery of offensive weapons and associated materiel to Cuba.

For the purposes of this Proclamation, the following are declared to be prohibited materiel:

Surface-to-surface missiles; bomber aircraft; bombs; air-to-surface rockets and guided missiles; warheads for any of the above weapons; mechanical or electronic equipment to support or operate the above items; and any other classes of

materiel hereafter designated by the Secretary of Defense for the purpose of effectuating this Proclamation.

To enforce this order, the Secretary of Defense shall take appropriate measures to prevent the delivery of prohibited materiel to Cuba, employing the land, sea and air forces of the United States in cooperation with any forces that may be made available by other American States.

The Secretary of Defense may make such regulations and issue such directives as he deems necessary to ensure the effectiveness of this order, including the designation, within a reasonable distance of Cuba, of prohibited or restricted zones and of prescribed routes.

Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subject to being taken into custody. Any vessel or craft which it is believed is en route to Cuba and may be carrying prohibited materiel or may itself constitute such materiel shall, wherever possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails or refuses to obey such direction. All vessels

or craft taken into custody shall be sent into a port of the United States for appropriate disposition.

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE in the City of Washington this twenty-third day of October in the year of our Lord, nineteen hundred and sixty-two, and of the Independence of the United States of America the one hundred and eighty-seventh.

(Seal)

(Signed)

John Fitzgerald Kennedy
7:06 p. m.
October 23rd 1962

By the President:

DEAN RUSK,
Secretary of State.

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed,

DONE in the City of Washington this twenty-third day of October in the year of our Lord, nineteen hundred and sixty-two, and of the Independence of the United States of America the one hundred and eighty-seventh.

(Seal)

John Fitzgerald Kennedy

October 23rd 1962

By the President:

DEAN RUSK,

Secretary of State.

APPENDIX B

TEXT OF OAS RESOLUTION[1]

WHEREAS,

The Inter-American Treaty of Reciprocal Assistance of 1947 (Rio Treaty) recognizes the obligation of the American Republics to "provide for effective reciprocal assistance to meet armed attacks against any American state and in order to deal with threats of aggression against any of them"

Article 6 of the said Treaty states:

"If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent."

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[1]Adopted by the Council on October 23, 1962, by a vote of 19 to 0, with 1 abstention (Uruguay abstained on October 23 because its delegate had not received instructions from his Government; on October 24, Uruguay cast an affirmative vote, making approval of the resolution unanimous). Department of State Bulletin, XLVII (November 12, 1962), 722.

TEXT OF OAS RESOLUTION*

The Inter-American Treaty of Reciprocal Assistance of 1947 (Rio Treaty) recognizes the obligations of the American Republics to "provide for effective reciprocal assistance to meet armed attacks against any American state and in order to deal with threats of aggression against any of them."

Article 6 of the Rio Treaty states:

"If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of application to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent."

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*Adopted by the Council on October 23, 1962, by a vote of 19 to 0, with 1 abstention (Uruguay) modified on October 23 because its delegate had not received instructions from his government), on October 24, Uruguay cast an affirmative vote, making approval of the resolution unanimous. Department of State Bulletin, XLVII (November 12, 1962), 752.

The Eighth Meeting of Consultation of the Ministers of Foreign Affairs of the American Republics in Punta del Este in January, 1962, agreed in Resolution II "to urge the member states to take those steps that they may consider appropriate for their individual and collective self-defense, and to cooperate, as may be necessary or desirable, to strengthen their capacity to counteract threats or acts of aggression, subversion, or other dangers to peace and security resulting from the continued intervention in this hemisphere of Sino-Soviet powers, in accordance with the obligations established in treaties and agreements such as the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance";

The Ministers of Foreign Affairs of the American Republics meeting informally in Washington, October 2 and 3, 1962, reasserted "the firm intention of the Governments represented and of the peoples of the American Republics to conduct themselves in accordance with the principles of the regional system, staunchly sustaining and consolidating the principles of the Charter of the Organization of American States, and affirmed the will to strengthen the security of the hemisphere against all aggression from within or outside the Hemisphere and against all developments or situations capable of threatening the peace and security of the Hemisphere through the application of the Inter-American Treaty

of Reciprocal Assistance of Rio de Janeiro. It was the view of the Ministers that the existing organizations and bodies of the Inter-American system should intensify the carrying out of their respective duties with special and urgent attention to the situation created by the communist regime in Cuba and that they should stand in readiness to consider the matter promptly if the situation requires measures beyond those already authorized."

The same meeting "recalled that the Soviet Union's intervention in Cuba threatens the unity of the Americas and its democratic institutions, and that this intervention has special characteristics which, pursuant to paragraph 3 of Resolution II of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, call for the adoption of special measures, both individual and collective";

Incontrovertible evidence has appeared that the Government of Cuba, despite repeated warnings, has secretly endangered the peace of the Continent by permitting the Sino-Soviet powers to have intermediate and middle-range missiles on its territory capable of carrying nuclear warheads;

THE Council of the Organization of American States, Meeting as the Provisional Organ of Consultation, RESOLVES:

1. To call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability;

2. To recommend that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent;

3. To inform the Security Council of the United Nations of this resolution in accordance with Article 54 of the Charter of the United Nations and to express the hope that the Security Council will, in accordance with the draft resolution introduced by the United States, dispatch United Nations observers to Cuba at the earliest moment;

4. To continue to serve provisionally as Organ of Consultation and to request the Member States to keep the Organ of Consultation duly informed of measures taken by them in accordance with paragraph two of this resolution.